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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

REVEREND ROBERT PEARSON, ET AL.,
Petitioners,

- v. -

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911), this Court declared that, in the context of contempt proceedings, the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden* (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added). *See also, Hicks v. Feiock*, 485 U.S. 624 (1988) (reaffirming *Gompers* in context of contempt fines). Against this background, the first question presented here is:

   > Whether—as the Second Circuit Court of Appeals held below, and as is the growing trend in the lower courts—a contempt proceeding may be treated as civil in nature (so that none of the constitutional requirements for a criminal contempt proceeding need be followed) where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initial orders?

2. This Court has previously granted certiorari in this case *sub. nom. Pearson v. Planned Parenthood Margaret*

Sanger Clinic (Manhattan), ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix C: A-7). In *Pearson*, this Court vacated the judgment of the court of appeals in *Terry II*, 961 F.2d 390 (2d Cir. 1992) (Appendix D: A-8 to A-37) and remanded for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). Against this background, the second question presented is:

> Whether the court of appeals erred in reinstating its initial judgment without modification (including an award of attorneys' fees of over $150,000.00 under 42 U.S.C. § 1988), following an order by this Court which vacated the judgment and remanded for reconsideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), which held, on virtually identical facts, that 42 U.S.C. § 1985(3) does not provide a cause of action against anti-abortion demonstrators for obstructing access to abortion businesses and that therefore the Respondents are not entitled to attorneys' fees under § 1988?

PARTIES

The Petitioners are as follows: Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Christopher Slattery, Bistate Operation Rescue Network (B.O.R.N.), Randall A. Terry, Thomas Herlihy, and Operation Rescue.

The Petitioners were defendants and non-party contempt Respondents in the district court and appellants in the court of appeals. The following were defendants in the district court and were appellants in the court of appeals but are not presently Petitioners: Adele Nathanson, Florence Talluto and Michael LaPenna. Contempt was not sought against defendant Reverend James P. Lisante.

The Respondents are as follows: Planned Parenthood Margaret Sanger Clinic (Manhattan); New York State National Organization for Women; New York State Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Heath; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan and Pro Choice Coalition. The Respondents were each plaintiffs in the district court and appellees in the court of appeals.

An Intervenor in the district court was the Respondent City of New York, which pressed a state law public nuisance claim. The City of New York did not seek contempt citations against either the defendants or non-party Petitioners in the proceedings at issue in the courts below. The United States was a judgment creditor (by virtue of the contempt fines) in the district court and a creditor-appellee in the court of appeals.

Petitioners B.O.R.N. and Operation Rescue are not a corporations under Rule 28.1 of the Rules of this Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993
NO. ____

Reverend Robert Pearson, et al.,
Petitioners

v.

Planned Parenthood Margaret Sanger
Clinic (Manhattan), et al.,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The three decisions of the district court resulting in two contempt judgments (Appendix H: A-89 to A-91 and Appendix E: A-38 to A-39) are reported in *New York State Nat'l Organization for Women v. Terry*, 732 F. Supp. 388 (S.D.N.Y. 1990) (Appendix I: A-92 to A-146), 737 F.Supp. 1350 (S.D.N.Y. 1990) (Appendix G: A-54 to A-88), and an unreported oral bench ruling which incorporates the first ruling (Appendix F: A-40 to A-53). The three underlying injunctive orders are included in the Appendix (A-147 to A-158). The appeals from these judgments were consolidated in the court of appeals. The prior decision of the court of appeals was issued on April 13, 1992, and is reported at 961 F.2d 390 (2d Cir. 1992) (Appendix D: A-8 to A-37). On February 22, 1993, the prior decision of the court of appeals was vacated and remanded by this Court *sub. nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix C: A-7). On July 2, 1993, in a brief *per curiam* decision the court of appeals reinstated its prior judgment without modification, which is reported at 996 F.2d 1351 (2d Cir. 1993) (Appendix B: A-3 to A-6). The Petitioners requested a rehearing en banc which was denied by the court of appeals on August 23, 1993 (Appendix A: A-1 to A-2).

JURISDICTION

The judgments of the United States District Court for the Southern District of New York were entered on May 8, 1990 and November 8, 1990. The consolidated appeals involving the contempt fines and the award of 42 U.S.C. § 1988 attorneys' fees on the main case in the United States Court of Appeals for the Second Circuit were decided on April 13, 1992. This Court vacated the decision of the court of appeals on February 22, 1993. The court of appeals reinstated its judgment without modification on July 2, 1993 and denied a petition for rehearing on August 23, 1993. This Court has jurisdiction, under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment Five provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. Constitution Amendment Fourteen provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy,

> whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are eight individuals and two organizations, personally and morally opposed to abortion who, as participants in peaceful and non-violent public demonstrations, were made subject to severe and purportedly coercive civil contempt fines totalling $375,000 for alleged violations of the three injunctions.[1]

These phenomenally large fines levied against anti-establishment political protesters, for their participation in anti-abortion rescue demonstrations which have been found by the Second Circuit to be "a form of political speech,"[2] are a means of repressing civil protest that would have been enthusiastically endorsed by Bull Connor and the Jim Crow South.

Petitioners have repeatedly asserted throughout these proceedings that the huge unconditional contempt fines and contempt attorneys' fees were criminal in nature, despite the lower courts' convenient label of "civil contempt penalties."

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[1] The district court issued three injunctions upon which the contempt fines and penalties are based: A temporary restraining order dated May 5, 1988 (Appendix L: A-155 to A-158), a preliminary injunction dated October 27, 1988 (Appendix K: A-151 to A-154), and a permanent injunction dated January 10, 1989 (Appendix J: A-147 to A-150).

[2] *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (hereinafter "*Terry I*").

This Court is presently reviewing the identical issues in *International Union, United Mine Workers v. Bagwell*, No. 92-1625.

A. Course of Proceedings

The district court had earlier issued a permanent injunction (A-147 to A-150) in this action.[3] Subsequently, the private Respondents brought orders to show cause for summary judgment of contempt against the defendants and various non-party Petitioners for participating in Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in alleged violation of the temporary restraining order, preliminary injunction and permanent injunction.

The district court adjudged the Petitioners in contempt of its orders and levied fines purportedly for civil contempt totalling $375,000 and attorney's fees. The consolidated appeal of these huge fines and attorneys' fees was decided on April 13, 1992 by the court of appeals in *New York State Nat'l Organization for Women v. Terry*, 961 F.2d 390 (2d Cir. 1992) (hereinafter "*Terry II*") (Appendix D: A-8 to A-37).

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[3] *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), *aff'd as mod.*, *New York State Nat'l Org. for Women v. Terry*, 886 F. 2d 1339 (2d Cir. 1989) *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (affirming the district court's various underlying injunctive orders in the original action as modified to provide that previous contempt fines against plaintiffs Terry and Operation Rescue were to be paid into the court, not to the plaintiff National Organization for Women) (*Terry I*).

On February 22, 1993, the 1992 decision and judgment of the United States Court of Appeals for the Second Circuit in *Terry II*, 961 F.2d 390 (2d Cir. 1992) (Appendix D: A-8 to A-37) was vacated and remanded by this Court *sub. nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix C: A-7) for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993) (hereinafter "*Bray*"), rendered on January 13, 1993.

In its 1993 *per curiam* decision,[4] which was rendered purportedly in obedience to this Court's remand for reconsideration in light of *Bray*, and after the parties had briefed this issue,[5] the court of appeals again reinstated its initial vacated judgment on this appeal, without modification, and without any discussion of *Bray*. Essentially ignoring this Court's *Bray* decision, the 1993 *per curiam* decision appealed herein inexplicably failed to vacate the section 1988 award of attorneys' fees as this Court did in *Bray*. The court below further failed to remand the issues in this action to the district court, failed to issue further instructions to the district court, and failed to vacate its prior affirmance of the judgment of contempt penalties against Petitioners.

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[4] *New York State Nat'l Org. for Women v. Terry*, 996 F.2d 1351, (2d Cir. 1993) (*per curiam*; before Kearse, Mahoney, and Snead, Circuit Judges), attached as Appendix B: A-3 to A-6.

[5] Pursuant to the court of appeals' request to the parties of May 25, 1993, Petitioners submitted on June 11, 1993 a nine-page letter brief to address the proper disposition of the case in light of *Bray*.

Petitioners moved for rehearing in banc on July 16, 1993, which the court of appeals denied on August 23, 1993 (Appendix A: A-1 to A-2).

B. Statement of Facts

The Petitioners in this case were defendants or non-parties whom the district court held in contempt and against whom $375,000 in contempt fines were assessed payable to the United States. *See*, Judgments at Appendices H, E (A-89 to A-91 and A-38 to A-39).

The district court found that the demonstrations in which the Petitioners participated had been organized by defendant Operation Rescue so that "protestors each day would converge on a facility at which abortions were performed in an effort to close down the facility [and] . . . their purpose was to 'block the doors so they cannot do abortions today'." 732 F. Supp. at 393 (A-95), 405 (A-126).

In the 1989 Second Circuit opinion, the circuit court recognized that the "defendants' actions clearly are a form of political speech protected by the First Amendment." *Terry I*, 886 F.2d at 1363. The Second Circuit clearly acknowledged that the purpose of Operation Rescue demonstrations was to communicate the message "that abortion is wrong, immoral and must be stopped." *Terry I*, 886 F.2d at 1363.

For participation in one or more Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in the New York City area, the district court levied what it termed coercive civil contempt penalties and fines against the political protestors as follows:

Petitioner	Alleged TRO, Prel. or Perm. Injunction Violations	Unconditional Fines*
Rev. Jesse Lee	3	$100,000
Joseph Foreman	2	$ 25,000
Michael McMonagle	1	$ 25,000
Jeff White	1	$ 25,000
Rev. Robert Pearson	1	$ 25,000
Christopher Slattery	2	$ 25,000**
B.O.R.N.	1	$ 25,000
Randall A. Terry	3	$100,000***
Thomas Herlihy	1	$ 25,000
		$375,000

* 732 F. Supp. at 413-414 (A-145); 961 F.2d at 394 (A-17). Fines were also assessed against non-Petitioners Florence Talluto ($50,000 for 2 violations), Michael LaPenna ($25,000 for 1 violation) and Adelle Nathanson ($25,000 for 1 violation), for a total of $450,000.00. Talluto and LaPenna's fines were vacated by the court of appeals for lack jurisdiction due to improper service of the contempt papers. 961 F.2d at 398-400 (A-25 to A-30). Nathanson discontinued her appeal. Attorneys' fees were also assessed against all contemnors by the district court and were upheld by the Second Circuit. 961 F.2d at 394-395 (A-17 to A-18).

** Slattery was fined $50,000, $25,000 of which was suspended.

*** Terry's and Operation Rescue's fines were joint and several.

It is these phenomenally large contempt penalties, and their attendant attorney's fees, that the Petitioners seek to have vacated by this Court.

REASONS FOR GRANTING THE WRIT

I. The Purportedly Civil Contempt Fines and Penalties Issued By The District Court Rest On The Identical Legal Grounds at Issue in a Case Presently Before This Court, *International Union, United Mine Workers of America, and United Mine Workers of America, District 28 v. John L. Bagwell, Clinchfield Coal Co., and The "B" Mining Co.*, No. 92-1625

A. Issues Concerning The Constitutional Distinction Between Civil Contempt and Criminal Contempt.

Currently pending before this Court is the case of *International Union, United Mine Workers of America, v. Bagwell, cert. granted*, ___ U.S. ___, (June 1, 1993) (No. 92-1625) (hereinafter "*Bagwell*"), which raises legal issues identical to those raised by Petitioners here.

In particular, Questions No. 1 in *Bagwell* is:

> In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911), this Court declared that, in the context of contempt proceedings, the "distinction between *refusing to do an act commanded* (remedied by imprisonment until the party performs the required act), and *doing an act forbidden*

> (punished by imprisonment for a definite term)" is a distinction that is "sound in principle, and generally, if not universally, afford[s] a test by which to determine the [civil or criminal] nature of the punishment." 221 U.S. at 443 (emphasis added). *See also, Hicks v. Feiock*, 485 U.S. 624 (1988) (reaffirming *Gompers* in context of contempt fines). Against this background, the first question presented here is:
>
> Whether—as the Virginia Supreme Court held below, and as is the growing trend in the lower courts—a contempt proceeding may be treated as civil in nature (so that none of the constitutional requirements for a criminal contempt proceeding need be followed) where the defendant is charged with having taken certain completed actions that were *prohibited* by previously imposed judicial orders, and where a finding by the court that the defendant took such prohibited actions leads to the sentencing of the defendant to pay to the court (or the state) substantial fines (in fixed amounts not measured by any harm suffered by a civil party) that the court had established at the time of its initials orders?

Bagwell Pet. Cert. at i. The "Questions Presented" section of this Petition contains the identical first question presented in the *Bagwell* case.

In view of the excessive monetary penalties assessed against the Petitioners, this Court should *either grant* and consider this case with *Bagwell or hold* this Petition pending this Court's decision in *Bagwell*. If this Court answers this first question in the negative, as the *Bagwell* Petitioners urge, then this Court can, without more, ***either vacate and reverse*** in their entirety the allegedly civil contempt judgments, fines and penalties assessed against the Petitioners in the case at bar *or vacate and remand* for further proceedings consistent with the *Bagwell* decision.

In the Petition for Certiorari in the *Bagwell* case at pages 17-18, the Union Petitioners specifically cite a dangerous line of cases arising out of anti-abortion demonstrations:

> A line of recent cases arising out of anti-abortion demonstrations is illustrative. For example, in *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991), the trial judge enjoined the defendants and any person acting in concert with the defendants "from blocking access to abortion facilities and other activities in the state," and "provided for sanctions of $500 for each prospective violation of the order," *id.* at 531. Defendants violated this order, and the trial judge held them in civil contempt.
>
> On appeal, the Ninth Circuit acknowledged this Court's instruction in *Hicks* that a contempt fine is civil "when the defendant can avoid paying the fine simply by performing the . . . *act required by the court's order,*" 929 F.2d at 532 (emphasis added). But the Ninth Circuit determined that defendants had "committed the *act* that subjected them to contempt by *failing to comply with the court's prospective order,*" *id.* at 532, and thus held that the trial judge had properly proceeded in civil contempt, *id.* Such verbal sleight of hand—through which a failure-to-comply with a

prohibition is somehow transmuted into the failure to do an affirmative act commanded—empties the mandatory/prohibitory dichotomy of meaning and robs the *Gompers* test of its content.

Other lower court decisions have adopted the same stratagem. *See, e.g., Roe v. Operation Rescue*, 919 F.2d 857, 869 (3d Cir. 1990) *(trial judge appropriately enforced a prohibitory order in civil contempt because "the contemnors' obligation to pay these fines was contingent on a future violation of its orders"); N.Y. State National Organization for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) (trial judge appropriately enforced a prohibitory order in civil contempt because "[t]he prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights"); Lovejoy Specialty Hosp. v. Advocates for Life, Inc.*, 802 P.2d 684 (Or. App. 1990), *pet. rev. dismissed as moot*, 814 P.2d 511 (Or. 1991) (same).

In practical terms, this burgeoning rule—that, even where a prohibitory decree is being enforced, the contempt is civil if the surface form of the order imposing contempt sanctions is conditional—shrinks criminal contempt to the verge of invisibility. To avoid the inconvenience of meeting the Constitution's requirements for criminal cases, all that a judge need do is announce in advance that, if his decree is violated, he will impose a fine or a jail

> sentence. Doing so transforms all sanctions imposed for any subsequent disobedience into civil contempt sanction. The lower court's creation of this rule—which trivializes the Court's precedents and the important constitutional interest these precedents implement—calls for this Court's review.

Bagwell Pet. Cert. at 17-18 (footnote omitted; emphasis added).

The decision of the Supreme Court of Virginia, *Bagwell v. International Union, United Mine Workers of America*, 244 Va. 463, 423 S.E.2d 349 (1992), now under review by this Court on certiorari in *Bagwell*, relied on the same legal grounds as the appealed decision herein. The Supreme Court of Virginia held that the substantial fines imposed against the Union and its member were "valid, *coercive*, civil fines" and "not *compensatory* civil fines." 244 Va. at 477, 423 S.E.2d at 357 (emphasis added). The court continued:

> Furthermore, other courts share our view respecting the validity of employing a prospective, civil fine schedule to coerce defendants into future compliance with a court's prohibitory injunction. *See, e.g., New York State Nat. Organization For Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 532-33 (9th Cir. 1991); *Clark v. International Union, UMWA*, 752 F. Supp. 1291, 1297 (W.D. Va. 1990).

Id., 423 S.E.2d at 357-58 (footnote omitted).

The identical issue was addressed in the 1992 *Terry II* decision of the court of appeals in this case which was vacated by this Court:

> [Appellants] argue that the contempt fines imposed by the district court were criminal rather than civil, in nature, and that appellants were not accorded procedural protections required in criminal contempt proceedings; we ruled to the contrary in *Terry I*. *See id.* at 1350-51. These issues are therefore settled in this circuit, absent reconsideration in banc or a different ruling by the Supreme Court. *See, e.g. Leecan v. Lopes,* 893 F.2d 1434, 1443 (2d Cir.), *cert. denied,* ___ U.S. ___, 110 S. Ct. 2627, 110 L.Ed.2d 647 (1990).

961 F.2d at 396 (A-20). Thus this Court's decision in *Bagwell* on the same issue will be controlling with respect to the appealed 1993 Second Circuit *per curiam* decision which reinstated *Terry II*, as it squarely controls the issue that *Terry II* refused to reexamine, *i.e.*, whether the contempt fines in that case were criminal in nature and thus were imposed without affording Petitioners due process.

The fact that the lower courts have conveniently denominated their penalty civil coercive contempt is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The unconditional and punitive character of the court's contempt proceeding orders made the contempt criminal. *Hicks v. Feiock, supra*, 485 U.S. at 632-633. So did their irrational severity, 100 times the criminal fine for the same offense in the absence of any damage to Respondents.[6] *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 1901-1904, 104 L.Ed.2d. 487 (1989). Since none of the due process protections, required in criminal proceedings, were afforded Petitioners, the contempt judgments must be reversed. *Young v. U.S. ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987). *See, Penfield Co. of California v. Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional $50.00 fine was a criminal sanction); *Union Tool Co. v. Wilson*, 259 U.S. 107, 110 (1922) (a $2,500 fine payable to the court was a criminal sanction); *Nye v. United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks v. Feiock, supra.*

The criminal nature of the contempt judgments is further revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). *In re Christensen Engineering Co.*, 194 U.S. 458, 24 S. Ct. 729, 48 L.Ed. 1072 (1904), involved the defendant's appeal of a $1,000.00 contempt fine in a patent suit for "disobedience of a preliminary injunction . . . . The fine was payable, one half to the United States and the other half to the complainant." 194 U.S. at 459. In explaining the criminal nature of the fine, this Court said:

> These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured

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[6] The private Respondents during the contempt proceeding in the court below submitted arrest lists of some of the individual Petitioners, which lists show that they were charged with disorderly conduct, a violation, which carries a maximum fine of $250.00. *See*, New York Penal Law §§ 240.20 and 80.05(4). *See also People v. McDaniel*, 154 Misc. 2d 89, 593 N.Y.S.2d 154 (App. Term), *appeal denied*, 81 N.Y.2d 889, 613 N.E.2d 982 (1992).

> by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.
>
> In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such, it dominates the proceeding, and fixes its character. 194 U.S. at 460, 461.

In *In re Merchants' Stock & Grain Co.*, 223 U.S. 639, 32 S. Ct. 339, 56 L.Ed. 584 (1912), contempt fines totalling $3,500, imposed for disobedience of a preliminary injunction, payable 75% to the plaintiff and 25% to the United States, were held to be criminal in nature, relying on *Christensen Engineering, supra*.

Citing both *Christensen Engineering* and *Merchants Stock & Grain*, Justice Brandeis, in *Union Tool Co. v. Wilson*, explained that:

> Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review.

259 U.S. 107, 110 (1922). The instant contempt fines totalling $375,000, are not even a mixture of compensatory and punitive, but are payable solely to the United States. They are not compensatory; they are punitive and as such, criminal in nature.

The fact that the Second Circuit in its prior *Terry I* opinion, 886 F.2d 1339, modified the November 3, 1988, $50,000 Contempt Judgment, to be payable to the court (the United States) and not to the private Respondent N.O.W., reveals that the present contempt fines are clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are clearly "intended as a deterrent to offenses against the public"[7] and "to punish the act of disobedience as a public wrong."[8]

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. *See, Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Hicks v. Feiock, supra*; *Penfield v. Securities & Exchange Commission, supra*; *Doyle v. London Guarantee & Acci. Co.*, 204 U.S. 599, 51 L.Ed. 641, 644 (1907) ("compliance with the order relieves from payment."). When unconditional contempt fines were entered against the Petitioners, there was nothing the Petitioners could have done to purge themselves of the contempt.[9] The judgments were therefore, *ipso facto*, criminal in nature.

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[7] *Nye, supra*, 313 U.S. at 42.

[8] *Michaelson v. United States*, 266 U.S. 42, 65 (1924).

[9] The issue of the opportunity to purge was raised by counsel for Petitioners at the hearing on motion for summary judgment for contempt fines before Judge Ward in the district court. Transcript of Hearing (S.D.N.Y. July 28, 1989), at 46-49, 53-55, 90-94, 119, 126-127. The court refused requests to make the fines conditional on future conduct – thereby allowing Petitioners to purge themselves of contempt – holding that the fines were civil and not criminal. *Id.* at 127-128. In a subsequent hearing as to Petitioner Slattery, the court imposed a fine of $50,000, which was unconditional in part, and $25,000 of which was suspended and conditioned upon future conduct. *See* Appendix F (A-51).

The Second Circuit's 1992 *Terry II* decision (961 F.2d at 395 (A-12)) which reaffirmed its prior ruling in *Terry I* (886 F.2d at 1350-1351) that the Petitioners' opportunity to comply with the order came *before* a violation occurred only manifests the invalidity of the Second Circuit's reasoning and suggests that due process is truly turned on its head when pro-life demonstrators are in the dock. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed with *conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.[10]

These conditionality and purge mechanism requirements for civil contempt have been followed by other circuit courts,[11] as well as other Second Circuit decisions.[12] Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion rights, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 812 (1986) (White, J., dissenting).

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[10] *See also, Crozer-Chester Medical Center v. Moran*, 522 Pa. 124, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

[11] *Douglass v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976); *United States v. Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States v. Spectro Foods Corp.*, 544 F.2d 1175 (3rd Cir. 1976); *United States v. North*, 621 F.2d 1255 (3rd Cir.), *cert. denied, sub. nom. Eyler v. United States*, 449 U.S. 866 (1980); *In re Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983).

II. This Court's Vacate and Remand Order in *Pearson* Requires The Court of Appeals to, at Minimum, Vacate its Judgment and Remand With Instructions to the District Court to Enter Judgment For Petitioners on the Federal Claims, Especially an Order to Vacate The Section 1988 Attorneys' Fees Award of Over $150,000. The Second Circuit's Refusal to Amend its Judgment in Light of *Bray*, Despite This Court's Mandate, Was Erroneous.

This Court has previously granted certiorari in this case *sub. nom Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, __ U.S. __, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) (Appendix C: A-7) (hereinafter "*Pearson*"). In *Pearson*, this Court vacated the judgment of the court of appeals in *Terry II*, 961 F.2d 390 (2d Cir. 1992) (Appendix D: A-8 to A-37) and remanded for further consideration in light of *Bray v.*

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[12] *In re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Arambulo v. United States*, 485 U.S. 1039 (1988) (stating a $50,000 fine was clearly criminal contempt); *United States v. Ayer*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

Alexandria Women's Health Clinic, 506 U.S. __, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993).

In *Bray*, this Court rejected the application of 42 U.S.C. § 1985(3) to Operation Rescue sit-ins and blockades of abortion businesses and further vacated the *Bray* respondents' section 1988 award of attorney's fees.

Upon remand from *Pearson*, the court below did not vacate the section 1988 award of over $150,000 in attorneys' fees in this case, but rather reinstated its prior vacated judgment without modification in a *per curiam* decision. (Appendix B: A-3 to A-6).

This Court must intervene to correct the court of appeals refusal to follow this Court's mandate in *Pearson*.

The court of appeals' *per curiam* opinion of July 2, 1993, which merely reinstated its initial judgment, is in direct defiance of this Court's mandate in *Pearson* to apply *Bray*, in that it (1) fails to give controlling effect to this Court's decision interpreting the scope of 42 U.S.C. § 1985(3) to exclude application to blockades of abortion clinics by pro-life demonstrators who oppose abortion -- a scenario virtually identical to that presented herein; (2) fails to recognize that the cause of action under § 1985(3) is lacking in merit on and after the date *Bray* was decided; and (3) most importantly fails to follow the relief mandated in *Bray*, *i.e.*, reversal of the merits of the § 1985(3) claim and reversal of the award of attorney's fees and costs thereunder of over $150,000, which this Court in *Bray* specifically ordered with respect to the parties in that case. 122 L.Ed.2d at 56-57.

The rule of law announced in *Bray* is required to be given full retroactive effect in this case, even as to those matters adjudicated in *Terry I*. In *Harper v. Virginia Dept. of Taxation*,

___ U.S. ___, 113 S. Ct. 2510, 2517 (June 18, 1993), the Court held that when the U.S. Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given *full retroactive effect* in *all cases* still open on direct review and as to *all events*, regardless of whether such events predate or postdate the announcement of the rule. Thus, it is clear that *Bray* must be given full retroactive effect as to all issues in this case.

The court of appeals erred in its failure to apply the precedent of *Bray* to its prior determination in *Terry II*, and in refusing to correct this error on rehearing. *See*, Fed. R. App. P. 35 and 40. By reinstating its prior *Terry II* judgment, the court of appeals has ignored the clear mandate in *Pearson* and has placed itself squarely at odds with this Court's ruling in *Bray* and *Pearson*.

In its 1993 *per curiam* decision, the Second Circuit reasoned that application for relief in light of *Bray* should be addressed in the first instance to the district court. While Petitioners are not unmindful of the court's directive, by *reinstating* its prior judgment, the court of appeals has in effect entered a *final* judgment in the case as to the contempt fines, contempt attorneys' fees and section 1988 attorneys' fees on the main case, thereby rendering any application to the district court futile.

The *Bray* case presented virtually the same legal issues and arose out of a factual situation so analogous that it is virtually indistinguishable from the present case. Indeed, the lower court upon reconsideration made no attempt to distinguish *Bray*. Furthermore, the Fourth Circuit decision, *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (*per curiam*), vacated and reversed in part by this Court in *Bray*, explicitly relied on the Second Circuit's earlier decision in these proceedings, *Terry I*, 886 F.2d 1339 (2d. Cir.

1989), *cert. denied*, 495 U.S. 947, 110 S. Ct. 2206, 109 L.Ed.2d 532 (1990), finding the case controlling. 914 F.2d at 585. Therefore, *Bray*'s holding, that the "Ku Klux Klan Act," 42 U.S.C. § 1985(3), does not provide a cause of action against anti-abortion advocates for obstructing access to abortion businesses, is controlling and warrants dismissal of all federal claims in the instant case as well as vacature of the section 1988 award of attorneys' fees to the Respondents.

The 1993 *per curiam* decision reinstated its judgment in *Terry II* without any modification (Appendix B: A-3 to A-7). However, the *Terry II* holding that 42 U.S.C. § 1985(3) provides a cause of action for obstructing access to abortion businesses, was premised upon three articulated bases: (1) that women seeking abortions constitute a valid "class of persons" for purposes of 42 U.S.C. § 1985(3); (2) that Petitioners' actions directed at the prevention of abortions amounted to a "class-based animus" required for a violation of section 1985(3); and (3) that Petitioners' actions violated the constitutional right to travel of persons seeking abortions. *Terry II*, 961 F.2d at 395 (A-19, 20). *See, Terry I*, 886 F.2d at 1358-61; *New York State Nat'l Organization for Women v. Terry*, 704 F. Supp. 1247, 1258-59 (S.D.N.Y. 1989). *These rulings have been unambiguously rejected in Bray.*

It is therefore clear that in light of *Bray* there is no basis upon which it could be argued that the court of appeals' prior *Terry II* judgment affirming the district court on the merits of Respondents' § 1985 claims and its award of § 1988 attorneys' fees, should have been reinstated following this Court's remand in *Pearson*. Indeed, *Bray* itself recognizes that any § 1985(3) claim with respect to similar facts after the date of the *Bray* decision cannot be maintained, and would be frivolous:

> Petitioners . . . contend that Respondents' § 1985(3) claims were so insubstantial that the

> District Court lacked subject-matter jurisdiction over the action, including the pendant state claims . . . While Respondents' § 1985(3) causes of action fail, they were not, *prior to our deciding of this case*, "wholly insubstantial and frivolous," *Bell v. Hood*, 327 U.S. 678, 682-683, 90 L.Ed. 939, 66 S.Ct. 773, 13 A.L.R.2d 383 (1946), so as to deprive the District Court of jurisdiction.

Bray, 122 L.Ed.2d at 56 (emphasis added).

Thus, *Bray* conclusively disposes of the federal claims under § 1985 in this case, and the appropriate remedy under *Bray* requires the court of appeals to reverse its judgment and remand with instructions to the lower court to dismiss with prejudice all § 1985 claims against Petitioners.[13] Since reasonable attorney's fees are allowed in the court's discretion under 42 U.S.C. § 1988 *only* to the "prevailing party" in a § 1985 action, the court of appeals was also required to vacate the award of attorney's fees and costs with respect to any litigation of the federal claims. *See, Bray*, 122 L.Ed.2d at 56. *See also, New York State Nat'l Organization for Women v. Terry*, 737 F. Supp. 1350, 1357-67 (S.D.N.Y. 1990) (Appendix G: A-63 - A-84) (district court specifically held that it was awarding contempt attorney fees under section 1988).

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[13] Petitioners respectfully submit that the Second Circuit should have been guided by the example of the Fourth Circuit, on remand from this Court in *Bray*, which remanded the case to the district court "[i]n obedience to the Supreme Court's mandate" for further proceedings consistent with that Court's opinion, and without reinstating its prior judgment which *Bray* vacated. *Nat'l Org. for Women v. Operation Rescue*, No. 90-985 (4th Cir. filed Feb. 11, 1993).

Bray, a case of first impression in the United States Supreme Court, which adjudicated issues of great interest and importance to many segments of American society, is a decision of exceptional importance, and its proper application in the Second Circuit is likewise a matter of significant importance. In a broader perspective, the proper implementation of newly announced rules of law by the High Court is at stake. Petitioners submit that the court of appeals' reinstatement of its prior decision and judgment in *Terry II* after *Bray* is insupportable and places the Second Circuit conflict with the clear mandate of this Court in *Pearson*.[14] Therefore this Court should grant certiorari and apply *Bray* to the instant case in light of the lower court's failure to do so.

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[14] Assuming, arguendo, that this Court determines in *Bagwell* that the contempt fines and attorneys' fees assessed against Petitioners do not implicate constitutional due process, then *Bray* nonetheless would require that the court's judgments in *Terry II*, if premised solely on the state law claims of trespass and public nuisance, conform to the substantive law of the State of New York under the doctrine first articulated in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *See*, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4515 (1982). *See also*, *Bray*, 122 L.Ed.2d at 56-57.

As Petitioners have argued in the court of appeals, in light of the dismissal of the federal claims by *Bray*, any injunctive relief, contempt fines and contempt attorneys fees should conform to New York State Judiciary Law § 773 which is controlling as to both the amount of fines and attorneys' fees in actions for contempt of court's orders when said orders are deemed to rest on state law claims alone. Where it is not shown that actual loss or injury has been caused, "a fine may be imposed, not to exceed the amount of the complainant's costs and expenses, and two hundred fifty dollars in addition thereto . . ." McKinney's N.Y. Judiciary Law § 773 (1992). As noted by the court of appeals in *Terry I*, no damages have been proved in this case. 886 F.2d 1339, 1353. Therefore, even if *Bagwell* is found distinguishable, the judgment should still be amended to conform to substantive state law.

Contrary to the *per curiam* opinion of July 2, 1993, Petitioners do not seek remand of the matter to *state* court, but rather suggested remand to the district court with instructions to reconsider the contempt judgments under substantive law of the State of New York, as was required by the *Bray* decision, assuming that the court of appeals did not vacate and dismiss the contempt awards of its own volition in the first instance.

CONCLUSION

For the foregoing reasons and those of the *Bagwell* Petitioners and their Amici Curiae supporters, the Petitioners pray that this Petition be granted and that the contempt judgments assessing $375,000 in fines with their attendant attorneys' fees, against the defendants and non-party Petitioners be *either vacated and reversed* in their entirety *or vacated and remanded* for further proceedings consistent with this Court's decision in *Bagwell*.

Petitioners further pray that this Court *remand* with instructions to the court of appeals to *vacate* the award of attorneys fees under 42 U.S.C. § 1988 associated with any litigation of the federal claims under 42 U.S.C. § 1985(3), against the defendants Petitioners, pursuant to this Court's previous mandate in *Pearson*.

Dated: New Milford, CT.
November 19, 1993

Respectfully submitted,

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APPENDICES

Appendix A: **Denial of Petition For Rehearing and Suggestion For Rehearing En Banc by U.S. Court of Appeals for the Second Circuit, August 23, 1993, *New York State Nat'l Organization for Women v. Terry*, (unpublished)** A - 1

Appendix B: *Per Curiam* Opinion of the U.S. Court of Appeals for the Second Circuit on Remand from the U.S. Supreme Court, July 2, 1993, *New York State Nat'l Organization for Women v. Terry*, 996 F.2d. 1351 (2d Cir. 1993). A - 3

Appendix C: Opinion of the U.S. Supreme Court, February 22, 1993, *Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 113 S.Ct. 1233, 122 L.Ed.2d 640 (No. 92-282) A - 7

Appendix D: Opinion of U.S. Court of Appeals for the Second Circuit, April 13, 1992, *New York State Nat'l Organization for Women v. Terry*, 961 F.2d 390 (2d Cir. 1992) A - 8

Appendix E: Order assessing contempt fines against Petitioner Christopher Slattery, November 8, 1990 A - 38

Appendix F: Oral Bench Ruling of the U.S. District Court for the Southern District of New York, November 8, 1990 A - 40

Appendix G: Opinion of U.S. District Court for the Southern District of New York, May 31, 1990, *New York State Nat'l Organization for Women v. Terry*, 737 F. Supp. 1350 (S.D.N.Y. 1990) A - 54

Appendix H: Order assessing contempt fines against Petitioners, May 8, 1990 A - 89

Appendix I: Opinion of U.S. District Court for the Southern District of New York, February 27, 1990, *New York State Nat'l Organization for Women v. Terry*, 732 F. Supp. 388 (S.D.N.Y. 1990) A - 92

Appendix J: Permanent Injunction dated January 10, 1989 A - 147

Appendix K: Preliminary Injunction dated October 27, 1988 A - 151

Appendix L: Temporary Restraining Order dated May 5, 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of August one thousand nine hundred and ninety-three.

NEW YORK STATE NOW, ET. AL.,

v.

TERRY, ET. AL.

DOCKET NUMBER: 90-6187

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants Randall A. Terry, Operation Rescue and Thomas Herlihy and Respondents-appellants Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Bistate Operation Rescue Network (B.O.R.N.) and Christopher Slattery,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active services and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT,
Elaine B. Goldsmith, Clerk
By: /s/ KATHY BROUWER
Kathy Brouwer, Operations Mgr.
8-23-93
(Date)

APPENDIX B

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights - New York Metropolitan Area; New York State National Abortion Rights Action League; Planned Parenthood of New York City, Inc.; Eastern Women's Center Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; The Center For Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro-Choice Coalition, Plaintiffs-Appellees,

and

The City of New York, Intervenor-Appellee,

and

United States of America,
Creditor-Appellee,

v.

Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s); Jane Doe(s), the last two being fictitious NAMES, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants

who are engaging in, or intend to engage in, the conduct complained of herein, Defendants,

Randall A. Terry; Operation Rescue;
and Thomas Herlihy,
Defendants-Appellants,

Bernard Nathanson, Respondent,

Jesse Lee; Joseph Foreman; Michael McMonagle; Jeff White; Florence Talluto; Michael LaPenna; Adelle Nathanson; Reverend Robert Pearson; BiState Operation Rescue Network; and Christopher Slattery, Respondents-Appellants,

A. Lawrence Washburn, Jr.,
Counsel-Appellant.

No. 1427, 1552 and 1553,
Dockets 90-6187, 91-6011 and 91-6029.

United States Court of Appeals,
Second Circuit

Argued May 20, 1991.

Decided April 13, 1992.

Vacated March 29, 1993.

Reinstated July 2, 1993.

The judgment entered pursuant to our initial opinion on this appeal, *see* 961 F.2d 390 (2d Cir. 1992), was vacated by the Supreme Court and remanded for reconsideration in light of *Bray v. Alexandria Women's Health Clinic*, ____ U.S. ____, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993). We reinstate the judgment.

William P. Harrington, White Plains, New York, A. Lawrence Washburn, Jr., New York City (Bleakley, Platt & Schmidt, White Plains, New York, Michael P. Tierney, Karin M. Burke, Legal Center for Defense of Life, New York City, and Joseph P. Secola, McCarthy & Secola, New Milford, Connecticut, of counsel), for Defendants-Appellants and Respondents-Appellants.

David Cole, Washington, D.C., Ruth Jones, Deborah Ellis, New York City (Center for Constitutional Rights, Washington, D.C., NOW Legal Defense & Education Fund, New York City, of counsel), for Plaintiffs-Appellees.

Hillary Weisman, Asst. Corp. Counsel for the City of New York, New York City (O. Peter Sherwood, Corp. Counsel for the City of New York, of counsel), for Intervenor-Appellee.

Before: KEARSE, MAHONEY and SNEED,[*] Circuit Judges.

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[*] The Honorable Joseph T. Sneed, Judge of the United States Circuit Court for the Ninth Circuit, sitting by designation.

PER CURIAM:[**]

We initially decided this appeal in *New York State National Organization for Women v. Terry*, 961 F.2d 390 (2d Cir. 1992). The Supreme Court granted certiorari *sub. nom Pearson v. Planned Parenthood Margaret Sanger Clinic*, and vacated and remanded for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993). *Pearson*, ___ U.S. ___, 113 S. Ct. 1233, 122 L.Ed.2d 640 (1993). We then directed the submission of letter briefs by the parties regarding the proper disposition upon remand.

We now reinstate the initial judgment in this appeal entered pursuant to our prior opinion. Applications for such relief in light of *Bray* as dismissal of the federal claims, a remand of the action to state court, or reconsideration of the contempt sanctions litigated on this appeal should be addressed in the first instance to the district court.

[**] Decision reported at 996 F.2d 1351 (2d Cir. 1993).

APPENDIX C

Robert PEARSON, et al., petitioners, v. PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN,) et al.

No. 92-282.

Case below, *N.Y. State Nat. Org. for Women v. Terry*, 732 F.Supp. 388; 737 F.Supp. 1350; 961 F.2d 390.

Feb. 22, 1993.* On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, 506 U.S. _____, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993).

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* Decision reported at 113 S.Ct. 1223, 122 L.Ed.2d 640 (Feb. 22, 1993).

APPENDIX D

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropoli-tan Area; New York State National Abortion Rights Action League; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition, Plaintiffs-Appellees,

and

The City of New York, Intervenor-Appellee,

and
United States of America
Creditor-Appelee,

v.

Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s); Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants,

Randall A. Terry; Operation Rescue;
and Thomas Herlihy,
Defendants-Appellants,

Jesse Lee; Joseph Foreman; Michael McMonagle; Jeff White; Florence Talluto; Michael LaPenna; Adelle Nathanson; Reverend Robert Pearson; Bistate Operation Rescue Network; and Christopher Slattery, Respondents-Appellants,

A. Lawrence Washburn, Jr.
Counsel-Appellant.

Nos. 1427, 1552, 1553, Dockets
90-6187, 91-6011, 91-6029.

United States Court of Appeals,
Second Circuit.

Argued May 20, 1991.

Decided April 13, 1992.

[392][1] Joseph P. Secola, New Milford, Conn. (A Lawrence Washburn, Jr., New York City, of counsel), for defendants-appellants, respondents-appellants (other than Christopher Slattery), and counsel-appellant.

Mary M. Gundrum, Center for Constitutional Rights, New York City (Alison Wetherfield, Ruth Jones, NOW Legal Defense & Education Fund, of counsel), for plaintiffs-appellees.

William P. Harrington, White Plains, N.Y. (Bleakley, Platt & Schmidt, of counsel), for respondent-appellant Christopher Slattery.

Gail P. Rubin, Asst. Corp. Counsel of the City of New York, New York City (Victor A. Kovner, Corp. Counsel of the City of New York, of counsel), for intervenor-appellee City of New York.

Nancy Kilson, Asst. U.S. Atty. for the Southern District of New York, New York City (Otto G. Obermaier, U.S. Atty. for the Southern District of New York, of counsel), for creditor-appellee U.S.

Before KEARSE, MAHONEY, and SNEED,* Circuit Judges.

MAHONEY, Circuit Judge:

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[1] Bracketed numbers indicate page numbers from decision reported at 961 F.2d 390 (2d Cir. 1992).

* The Honorable Joseph T. Sneed, Judge of the United States District Court for the Ninth Circuit, sitting by designation.

Defendants-appellants and respondents-appellants (other than Christopher Slattery) appeal[1] from an order entered May 10, 1990, and a final amended order entered July 9, 1990, of the United States District Court for the Southern District of New York, Robert J. Ward, Judge, that (1) adjudged them in civil contempt of orders and a permanent injunction previously entered by that court, (2) assessed contempt penalties against them in amounts ranging from $25,000 to $100,000, and (3) assessed attorneys' fees and costs against them in amounts ranging from $3,190.02 to $157,505.81. Respondent-appellant Christopher Slattery appeals[2] from an order and judgment [393] of that court entered December 26, 1990 that adjudged him in contempt of a preliminary injunction and a permanent injunction previously entered by that court, assessed a $50,000 contempt penalty against him, and stayed execution of judgment as to $25,000 on condition that Slattery commit no further violations of the injunctions. Counsel-appellant A. Lawrence Washburn, Jr. appeals from an amended final order of that court entered July 9, 1990 that assessed a sanction against him, pursuant to Fed.R.Civ.P. 11, in the amount of $11,712.47.

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[1] The appeals are complicated by various filings of notices of appeals followed by several vacaturs and reinstatements. After a careful review of the record, however, we are persuaded that all defendants-appellants and respondents-appellants, and counsel-appellant, are properly before us, except that respondent-appellant Bistate Operation Rescue Network has not perfected an appeal from the judgment entered against it on July 9, 1990 for $3,190.02 in attorneys' fees. We note that appeals have been noticed, presumably by inadvertence, on behalf of defendant Reverend James P. Lisante, against whom no order or judgment was entered, and respondent Bernard Nathanson, against whom no order or judgment was entered and whom the district court explicitly found not to have committed any civil contempt. *See* 732 F.Supp. at 406-07, 414. We note also that plaintiffs-appellees assert in their brief that respondent-appellant Adelle Nathanson has not taken an appeal, without contradiction by defendants-appellants and respondents-appellants in their reply brief or at oral argument. The record appears to indicate, however, that after stipulating to withdraw her then-pending appeal on January 24, 1991, respondent-appellant Adelle Nathanson filed a fresh notice of appeal on January 25, 1991.

The appealed rulings are premised upon two published opinions, *New York State National Organization for Women v. Terry*, 732 F.Supp. 388 (S.D.N.Y. 1990) and *New York State National Organization for Women v. Terry*, , 737 F.Supp. 1350 (S.D.N.Y. 1990), and (as to respondent-appellant Christopher Slattery) an unpublished oral bench decision.

We reverse as to respondents-appellants Florence Talluto and Michael LaPenna and counsel-appellant; we otherwise affirm.

Background

Plaintiffs-appellees are organizations that favor legalized abortion, health clinics that perform abortions, a doctor who performs abortions, and three religious leaders. Defendants-appellants are three individuals Randall A. Terry,

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[2] The court's oral decision as to respondent-appellant Christopher Slattery was rendered November 8, 1990. He filed a notice of appeal on December 6, 1990, and the former order and judgment against him was entered December 26, 1990. His appeal is validated by Fed.R.App.P. 4(a)(2).

Reverend James P. Lisante, and Thomas Herlihy, and an organization, Operation Rescue, opposed to legalized abortion. Plaintiffs also "named as defendants 'John Does' and 'Jane Does,' intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of." *New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324, 1327 n. 2 (S.D.N.Y. 1988). That conduct is the prevention of access to facilities in the New York City Area performing abortions.

In *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1357-64 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) (*"Terry I"*), we affirmed a permanent injunction entered by the district court on January 10, 1989 against defendants' efforts to block access to abortion clinics in certain New York State counties because we concluded that those attempts violated 42 U.S.C. § 1985(3) (1988), as well as state trespass and public nuisance law. (The injunction provides for prospective civil contempt penalties of $25,000 per day for its violation, and each successive violation results in doubling of the sanction applicable to the contemnor. *See New York State Nat'l Org. for Women v. Terry*, 704 F.Supp. 1247, 1263-64 (S.D.N.Y. 1989)). We also affirmed an earlier ruling entered October 27, 1988, *see New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324 (S.D.N.Y. 1988), in which the district court held, *inter alia*, that: (1) defendants Terry and Operation Rescue were in contempt of that court's May 4 temporary injunction,[3] which also provided for $25,000 per day sanctions, and imposed contempt sanctions of $25,000 against each of them; and (2) discovery sanctions pursuant to Fed.R.Civ.P. 37(a)(4) would be imposed against defendants. *See Terry I,* 886 F.2d at 1350-57. We modified the district court's ruling, however, by directing that the contempt sanctions be paid to the court, rather than to plaintiff-appellee New York State National Organization for Women ("N.O.W."), which had provided "no evidence of actual injury [to N.O.W.] due to Operation Rescue's activities." 886 F.2d at 1354.

The district court's October 27, 1988 contempt ruling was "without prejudice to plaintiffs' right to proceed against defendants Herlihy and Lisante, or against any other individuals who violated the Court's Order with notice." *New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. at 1338. Plaintiffs have since initiated contempt proceedings against various alleged participants in Operation Rescue's activities. *See New York State Nat'l Org. for Women* [394] *v. Terry,* 732 F.Supp. at 392-93. The demonstrators against whom plaintiffs sought contempt sanctions are the following organizations and persons: defendants-appellants Operation Rescue, Terry and Herlihy; respondent Bernard Nathanson; and respondents-appellants Bistate Operation Rescue Network ("B.O.R.N."), Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Florence Talluto, Michael LaPenna, Adelle Nathanson, Reverend Robert Pearson, and Christopher Slattery. *See id.* at 396 & n. 2.

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[3] *See* 697 F.Supp. at 1328. This injunction, adopted by the district court, was originally issued by the New York State Supreme Court, from which its action was removed. *See id.*

Plaintiffs-appellees' contempt application relates to four days of demonstrations at various facilities performing abortions: May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. *See id.* at 398. On all these dates, Operation Rescue members held demonstrations at which they blocked access to abortion facilities. *See id.* at 394-95. At the May 6, 1988 demonstration, the terms of the May 4, 1988 temporary injunction were read aloud by the New York City police before arrests began. *See id.* at 394. Similarly, on January 13 and 14, 1989, police officers read the applicable permanent injunction to the demonstrators before initiating arrests. *See id.* at 395.

The district court found, with respect to defendants-appellants, that "all of the demonstrations at issue in these contempt proceedings were initiated and coordinated by Operation Rescue," *id.* at 389-99; Terry led the demonstrations, engaging in "purposeful conduct designed to violate the Court's orders," *id.* at 399; and Herliy participated in the May 6 demonstration with notice of the district court's order against him. *See id.* The district court: (1) adjudged Terry and Operation Rescue to be in civil contempt of its October 27, 1988 order and permanent injunction , and assessed penalties in the amount of $100,000 against each of them; and (2) adjudged Herlihy to be in civil contempt of its May 4, 1988 order, and assessed a penalty in the amount of $25,000 against him. *See id.* at 413.

Contempt penalties were also assessed against respondents-appellants on the basis that "civil contempt sanctions may be assessed against nonparties who had actual notice of the [court's] orders in effect at the time in question and participated with defendants in violating those orders." *Id.* at 399-400. *See* Fed.R.Civ.P. 65(d) (order granting injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise"). After addressing and rejecting most of the respondents' arguments against the imposition of contempt sanctions, *see* 732 F.Supp. at 399-409, the district court found respondents-appellants in contempt of various of the court's orders and assessed contempt penalties against them, as set forth in the margin.[4] The district court further ruled that: "Each of the contemnors is liable to plaintiffs for a pro rata share of the attorneys' fees and [395] costs incurred by plaintiffs as a result of bringing the contempt motion against him or her." 732 F.Supp. at 414. Finally, the district court granted plaintiffs-appellees' motion for the imposition of a

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[4] The district court ruled as follows.

> Respondent B.O.R.N. is adjudged in civil contempt of this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman is adjudged in civil contempt of the Court's May 4, Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents McMonagle and White are adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Bernard Nathanson is not adjudged in civil contempt.

732 F.Supp. at 413-14. As to respondent-appellant Christopher Slattery, *see supra* note 2 and accompanying text.

Rule 11 sanction upon attorney A. Lawrence Washburn, concluding that "Washburn is liable to plaintiffs for the attorneys' fees and costs they incurred as a result of filing their motion for sanctions and responding to his renewed cross-motion to dismiss." *Id.*

Subsequent to these rulings, the district court issued another opinion addressing plaintiffs' applications for attorney's fees and costs incurred as a result of: (1) litigating the main action,[5] (2) bringing the contempt proceedings, and (3) Washburn's violation of Rule 11. *See New York State Nat'l Org. for Women v. Terry,* 737 F.Supp. 1350 (S.D.N.Y. 1990). The district court granted all these applications, but reduced the dollar amounts from those sought by plaintiffs-appellees (except as to the Rule 11 sanction against Washburn, which application was granted in full). *See id.* at 1358-67. Defendants-appellants were adjudged liable for attorneys fees and costs pursuant to section 1988 in the amount of $157,505.81; contemnors (including defendants-appellants) were assessed fees and costs in the total amount of $83,000.69. Rule 11 sanctions were assessed against Washburn in the amount of $11,712.47. *See id.* at 1367.

This appeal followed. *See supra* notes 1 and 2.

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[5] These fees were requested pursuant to 42 U.S.C. § 1988 (1988), which provides in pertinent part that:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

Discussion

A. *The Merits of Terry I.*

Appellants devote the bulk of their appeal to a reargument of issues that this court decided in *Terry I.* They contend that women are not a valid "class of persons" for purposes of 42 U.S.C. § 1985(3);[6] we held to the contrary in *Terry I.* *See* 886 F.2d at 1358-59. They argue that even if women are a valid class, appellants' actions directed at the prevention of abortions did not amount to the class-based animus required for a violation of section 1985(3); we ruled to the contrary in *Terry I.* *See id.* at 1359-60. They argue that they did not violate any constitutional right to travel of persons seeking abortions; we held to the contrary in *Terry I.* *See id.* at 1360-61. They argue that the contempt fines imposed by the district court were criminal, rather than civil, in nature, and that appellants were not accorded procedural protections required in criminal contempt proceedings; we ruled to the contrary in *Terry I.* *See id.* at 1350-51. These issues are therefore settled in this circuit, absent reconsiderations in banc or a different ruling by the Supreme Court. *See, e.g. Leecan v. Lopes*, 893 F.2d 1434, 1443 (2d Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2627, 110 L.Ed.2d 647 (1990).

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[6] Section 1985(3) provides in pertinent part:

> If two or more persons in any State ... conspire ... for the purposes of depriving, either directly or indirectly, *any person or class of persons* of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State ... from giving or securing to all peroses within such state ... the equal protection of the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. (emphasis added).

[1] In addition, our determination in *Terry I* constitute the law of the case. This doctrine requires that we "adhere[] 'to [our] own decision at an earlier stage of the litigation' unless there are 'cogent or **[396]** 'compelling' reasons not to, such as 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Sanders v. Sullivan*, 900 F.2d 601, 605 (2d Cir. 1990) (quoting *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983)). No such reason is presented here, at least at this juncture in the litigation.

We note in this regard that the Supreme Court has granted certiorari and heard oral argument in *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, ____ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991). In that case, the Fourth Circuit explicitly invoked *Terry I* for the proposition that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." 914 F.2d at 585. Even if the Supreme Court were to reverse the Fourth Circuit in *Bray*, however, it is unlikely that appellants could benefit form that ruling in this case.

The underlying injunctive orders pursuant to which contempt proceedings were brought against appellants were premised not only upon section 1985(3) but also upon the independent state law grounds of trespass and public nuisance. *See Terry I,* 886 F.2d at 1361-62. (It is noteworthy in this regard that plaintiffs-appellees initiated this action in state court, and defendants-appellants removed it to federal court. *See supra* note 3.) Accordingly, the district court's actions can be sustained on these state grounds, which have not been separately challenged on this appeal, so long as the federal claim asserted by plaintiffs-appellees "ha[s] substance sufficient to confer subject matter jurisdiction on the court." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) (citing *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933)); *see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 228 (6th Cir. 1991) (remanding for consideration whether injunction improperly premised upon alleged violation of section 1985(3) should be reinstated on state grounds of trespass, nuisance, or tortious interference with business); *Roe v. Operation Rescue*, 919 F.2d 857, 867-68 (3d Cir. 1990) (affirming injunction on unchallenged state grounds of trespass and intentional interference with contractual relations without addressing merits of section 1985(3) claim upon which injunction was also based).

Thus, only a federal claim that is "'so attenuated and unsubstantial as to be absolutely devoid of merit'" would preclude the district court's exercise of jurisdiction over the state trespass and public nuisance claims presented here. *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, 24 S.Ct., 553, 557, 48 L.Ed. 795 (1904)). Given our ruling in *Terry I*, and the general state of the law on this issue, *see National Org. for Women v. Operation Rescue*, 914 F.2d at 585 (collecting cases), it appears clear that plaintiffs-appellees have asserted a substantial federal claim adequate to ground jurisdiction over the state trespass and public nuisance claims. This conclusion is subject, however, to the caveat that the petition for certiorari in *Bray v. Alexandria Women's Health Clinic* poses for review, *inter alia*, the question: "Are respondents' claims under 42 U.S.C. 1985(3) so insubstantial as to deprive federal courts of subject matter jurisdiction?", 59 U.S.L.W. 3508 (U.S. Jan 21, 1991) (No. 90-985), and the grant of certiorari in *Bray* was not qualified regarding the questions to be considered by the Supreme Court. *See* ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991).

B. *Contentions of Respondents-Appellants Not Foreclosed by Terry I.*

Respondents-appellants, who were not parties to *Terry I*, have presented a number of arguments that are not foreclosed by *Terry I*, which we now address.

[397] 1. *Asserted Failure to Comply with Fed.R.Civ.P. 4(j).*

[2] Rule 43(a) of the Civil Rules of the United States District Court for the Southern District of New York

provides that a "proceeding to adjudicate a person in civil contempt of court ... shall be commenced by the service of a notice of motion or order to show cause." Where the alleged contemnor has not yet appeared in the action, "service shall be made personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." Id.

Respondents-appellants, upon whom service of orders to show cause was made as required by Rule 43(a), contend that they should be regarded as the unknown John Doe(s) and Mary Doe(s) named in plaintiffs-appellees' complaint, *see* Fed.R.Civ.P. 10(a); i.e., as defendants "presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein." They accordingly claim status as *defendants, rather than respondents*, in this case.

It follows, they argue, that service of the orders to show cause was required to comply with Fed.R.Civ.P. 4(j), which provides in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party of whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to the defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Because they were not served with the orders to show cause "within 120 days after the filing of the complaint," or (as they alternatively contend in their reply brief) within 120 days of the demonstrations for which they were adjudged in contempt, respondents-appellants contend that plaintiffs-appellees "must begin their entire injunction case afresh against the Respondents, not having served them in time to participate in the case against the four known defendants."

Respondents-appellants cite *Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers*, 855 F.2d 1080 (3d Cir. 1988), and *Rankel v. Greenburgh*, 117 F.R.D. 50 (S.D.N.Y. 1987), in support of this position, but these cases are not on point. *Napier's* only mention of rule 4(j) was in relation to the improper service of named, not fictitious, parties. *See* 855 F.2d at 1088 n. 4. Similarly, *Rankel* involved a motion to dismiss a named, not fictitious, party, and that motion was denied. *See* 117 F.R.D. at 54-55 & n 6.

We agree with the district court that "it is absurd to suggest that plaintiffs are forced to do the impossible: foretell which individuals will subsequently act in concert with defendants in violation of an injunctive order of the Court and serve them within 120 days of filing the complaint." *New York State Nat'l Org. for Women V. Terry*, 732 F.Supp. at 403 We conclude that the time constraints of Rule 4(j) do not apply to service in connection with a contempt proceeding arising out of violation of injunctions validly issued pursuant to Fed.R.Civ.P. 65(d). We next address respondents-appellants' claim that the injunctive orders in this case were not so issued.

2. *Compliance with Fed.R.Civ.P. 65(d).*

[3] Respondents-appellants further contend that they were not "in active concert or participation" with defendants, as required by Rule 65(d), because their actions "were independently motivated" by their "political, social and moral positions on the subject of ... abortion." We have no reason to doubt this representation, but it is unavailing as an escape hatch from Rule 65(d). The rule is directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation.

[4,5] Respondents-appellants also contend that the district court's injunctions [398] failed to "set forth the reasons for [their] issuance" and, because some of the defendants were fictitiously named, were not "specific in terms" and did not "describe in reasonable detail ... the act or acts sought to be restrained," all as required by Rule 65(d). We disagree. The requirement of a statement of reasons "applies to the order granting the relief and does not require that the injunction itself set forth the reasons why the court granted the order." 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2955 at 539 (1973). Here, the district court issued an extensive opinion that set forth the reasons for the injunctions. *See New York State Nat'l Org. for Women v. Terry*, 704 F.Supp. at 1257-64. As to respondents-appellants' other contention, the naming of fictitious defendants did not render the injunctions insufficiently precise because respondents-appellants had fair notice that acting in concert with the named defendants would subject them to contempt proceedings.

3. *Service upon Talluto and LaPenna.*

As noted earlier, Southern District Civil Rule 43(a) required that the order to show cause for the contempt motion be served upon respondents-appellants "personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." Respondents-appellants Florence Talluto and Michael LaPenna contend that service upon them did not comply with this mandate.

The district court's order to show cause provided that if "plaintiffs are unable to effect personal service after two attempts, they may serve respondents at their last known address by Federal Express." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400. Respondents were so served.[7] The district court concluded that its order allowing such service was proper under Fed.R.Civ.P. 4(c)(2)(C)(i), which allows service upon individuals "pursuant to the law of the state in which the district court is held." *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400-01.

The pertinent law is N.Y.Civ.Prac.L. & R. 308 (McKinney 1990). The district court concluded that service was proper under paragraph 5 of § 308, which permits personal service upon a natural person "in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one [personal service], two

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[7] Respondent-appellant Adelle Nathanson was also served in this manner, but no argument on this issue is advanced in her behalf on appeal. *See supra* note 1. The district court found that she had waived any objection to service, invoking Fed.R.Civ.P. 12(b)(5). *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400 n. 6.

['leave and mail' service[8]] and four ['nail and mail' service[9]] of this section." *Id.* § 308(5). The issue then, is whether personal, leave and mail, and nail and mail service were all "impracticable." *See Dobkin v. Chapman*, 21 N.Y.2d 490, 497-99, 236 N.E.2d 451, 455-56, 289 N.Y.S.2d 161, 167-68 (1968); *Dime Savings Bank of New York, FSB v. Mancini*, 169 A.D.2d 964, 964-65, 564 N.Y.S.2d 859, 859-60 (3d Dep't 1991); *Hitchcock v. Pyramid Centers of Empire State Co.*, 151 A.D.2d 837, 838-39, 542 N.Y.S.2d 813, 814-15 (3d Dep't 1989); *Giordano v. McMurtry*, 79 A.D.2d 548, 548-49, 433 N.Y.S.2d 583, 584 (1st Dep't 1980), *aff'd mem.*, 53 N.Y.2d 962, 424 N.E.2d 555, 441 N.Y.S.2d 668 (1981).

[399] LaPenna and Talluto argue that nail and mail was practicable. The district court disagreed, emphasizing that "those who have glagrantly violated the court's orders are

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[8] "Leave and mail" refers to:

> delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and ... either mailing the summons to the person to be served at his or her last known residence or ... mailing the summons by first class mail to the person to be served at his or her actual place of business.

Id. § 308(2).

[9] "Nail and mail" refers to:

> affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and ... either mailing the summons to such person at his or her last known residence or ... mailing the summons by first class mail to the person to be served at his or her actual place of business.

Id. § 308(4).

not disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 401 (quoting *Department of Housing Preservation & Dev. v. 24 West 132 Equities, Inc.*, 137 Misc.2d 459, 462, 524 N.Y.S.2d 324, 327 (App. Term 1st Dep't 1987), *aff'd mem.*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1st Dep't 1989), *appeal dismissed*, 74 N.Y. 2d 841, 545 N.E. 2d 872, 546 N.Y.S.2d 558 (1989), *cert. denied*, 493 U.S. 1078, 110 S.Ct. 1130, 107 L.Ed.2d 1035 (1990)). The district court thought that *Department of Housing* "suggested that the manner of service is sufficient if it is 'reasonably calculated under all the circumstances to apprise respondents of the pendency of the action.'" *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 401 (quoting *Department of Housing*, 137 Misc.2d at 462, 524 N.Y.S.2d at 327), and concluded that the service here was so calculated. *Id.*

We read *Department of Housing* differently. The "reasonably calculated" formulation stated by Appellate Term was addressed to the due process standard under the United States Constitution. This is made clear by the Appellate Term's citation, immediately following the quoted passage, of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), where it is stated that:
"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action...." In *Department of Housing*, the contemnor was served by leave and mail, *see* 137 Misc.2d at 461, 524 N.Y.S.2d at 326, and the court emphasized that respondent had been served in accordance with "one of the methods delineated in [section

308]." *Id.* at 462, 524 N.Y.S.2d at 327. Accordingly, the service in *Department of Housing* complied with the constitutional standard *and* with section 308.

[6] In this case, by contrast, there was concededly no compliance with paragraphs 1, 2, and 4 of section 308, so the issue becomes the impracticability standard of paragraph 5. The district court found impracticability because plaintiffs presented evidence of the "practical difficulties" they would encounter in effectuating service "because of respondents' demonstrated disregard for the authority of the Court." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. 401. This does not amount to a showing, however, that nail and mail service would not have been practicable.

As noted earlier, the district court's order to show cause allowed service by Federal Express at a respondent's "last known address" after two successful attempts at personal service. *See id.* at 400. Plaintiffs-appellees provided Federal Express with the names and last known addresses of LaPenna and Talluto. No reason appears why this information would not have sufficed for compliance with section 308(4); i.e., a mailing to the "last known residence" of LaPenna and Talluto, and affixation of the documents to the door of each's "actual place of business, dwelling place or usual place of abode." *Id.* The order to show cause did not require any showing that there was any confusion as to the residence or dwelling place of any respondent-appellant, i.e., any impracticability, before allowing a bypass of section 308(4).

[7] It was claimed at oral argument that the bulky motion papers involved could not practically have been "nailed" to any door, but section 308 requires only that they be "affix[ed]," and this may "be accomplished by use of a

nail, tack, tape, rubber band or some other device which will ensure a genuine adherence." *Pacamore Bearings, Inc. v. Foley*, 92 A.D.2d 959, 960, 460 N.Y.S.2d 662, 664 (3d Dep't 1983). We conclude that, in the absence of any showing, or requirement of a showing, that nail and mail service was impracticable, service under section 308(5) should not have been authorized by the district court.

[400] *See Dobkin*, 21 N.Y.2d at 497-99, 236 N.E.2d at 455-56, 289 N.Y.S.2d at 167-68; *Dime Savings Bank*, 169 A.D.2d at 964-65, 564 N.Y.S.2d at 859-60; *Hitchcock*, 151 A.D.2d at 838-39, 542 N.Y.S.2d at 814-15; *Giordano*, 79 A.D.2d at 548-49, 433 N.Y.S.2d at 584.

[8] When service is made pursuant to Fed.R.Civ.P. 4(c)(2)(C)(i), federal courts have no authority to stray from the requirements set by state law, here section 308, even if service in disregard of those requirements would still be constitutional. "[S]ervice of process must comply not only with constitutional requirements, but also with the provisions of the state statute." *FDIC v. Schaffer*, 731 F.2d 1134, 1136 (4th Cir. 1984). Numerous federal courts have refused to exercise jurisdiction over parties who were not served in accordance with the pertinent state statute. *See, e.g.*, *Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314-15 (5th Cir. 1986); *Delta S.S. Lines, Inc. v. Albano*, 768 F.2d 728, 730 (5th Cir. 1985); *National Trust for Historic Preservation v. 1750 K Inv. Partnership*, 100 F.R.D. 483, 485-86 (E.D. Va. 1984), *aff'd mem.*, 755 F.2d 927, 929 (4th Cir. 1985); *Sun Sys. Prefabricated Solar Greenhouses, Inc. v. Venuti*, 596 F.Supp. 1516, 1517 (E.D.N.Y. 1984). Similarly, we conclude that the district court lacked jurisdiction over Talluto and LaPenna.

4. *The Rule 11 Sanction against Washburn.*

[9] The district court imposed a Rule 11 sanction upon counsel-appellant A. Lawrence Washburn, Jr. because he sought to renew a motion that asserted: (1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals[,] and (3) improper service of the Order to Show Cause under Rules 4(c)(2)(C)(i) and (ii)." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 409. The court concluded that resubmission of the motion amounted to "vexations conduct, which unduly delayed the adjudication of the contempt proceedings." *Id.* at 412.

The court previously invited renewal of the motion, which had originally been submitted upon inadequate papers, but cautioned that "in the event the motion is renewed *and denied as frivolous*, the Court would entertain a motion by plaintiffs for appropriate sanctions." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 410 (emphasis added).

One of the grounds asserted in the motion has been determined on appeal not only to be nonfrivolous, but meritorious, resulting in reversal of the district court's ruling as to service upon Talluto and LaPenna. Thus, in view of the terms of the district court's invitation to resubmit the motion, it would be unfair and inappropriate to sanction Washburn for having done so, and we accordingly reverse the judgment imposing a Rule 11 sanction upon Washburn. *See Securities Indus. Ass'n v. Clarke*, 898 F.2d 318, 321-22 (2d Cir. 1990); *Motown Prods., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 785-86 (2d Cir. 1988) (per curiam).

This result is consistent with our recent ruling in *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1254-55 (2d Cir. 1992). In that case, we decided that it was not an abuse of discretion for the district court to impose Rule 11 sanctions upon a party that brought a motion (ultimately vindicated by our decision on appeal as meritorious) which was barred at that juncture in the district court by the law of the case doctrine, and also untimely under a local rule. Here, by contrast, Judge Ward invited resubmission of a motion that had not originally been presented on proper papers, and was thus initially denied without prejudice, but warned against an ultimate determination that the motion was frivolous. The ensuing determination of frivolousness, and the accompanying sanction, cannot survive a ruling on appeal that a key ground of the motion was not only nonfrivolous, but in fact a correct statement of the pertinent law.

[401] Conclusion

We reverse the judgments against respondents-appellants Florence Talluto and Michael LaPenna, and counsel-appellant A. Lawrence Washburn, Jr.; we affirm the judgments of the district court in all other respects.

SNEED, Senior Circuit Judge,
Concurring Separately:

I concur in the court's reversal of the district court's orders directed at respondents-appellants Talluto, LaPenna, and counsel-appellant. I concur in Part A of Judge Mahoney's opinion solely because of the compelling force of the law of this circuit as set forth in *New York State National Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir.

1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) (*"Terry I"*).

KEARSE, Circuit Judge, concurring and dissenting:

With all due respect, I dissent from so much of the majority opinion as reverses the district court's imposition of sanctions on defendants' attorney A. Lawrence Washburn, Jr. pursuant to Fed.R.Civ.P.11 for a frivolous motion for reargument. The basis of the reversal, *i.e.*, that the district court erred in deciding the underlying merits of one of the issues as to which reargument was sought, is contrary to our recent decision in *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, 956 F.2d 1245 (2d Cir. 1992) (*"Virgin Atlantic"*). Further, even if that were a permissible basis for reversal of a sanctions award, there were two other indisputably sound bases for the district court's imposition of sanctions, making it inappropriate for us to do more than vacate the imposition sanctions and remand to permit the district court to reconsider the matter of sanctions in light of our decision.

A. *The Service-of-Process Issue*

The motion that prompted the imposition of sanctions was threefold. It sought reargument of the district court's contempt order on the grounds of "(1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals[,] and (3) improper service of the Order to Show Cause under Rules 4(c)(2)(C)(i) and (ii).'" (Majority Opinion *ante* at 396). As to the third item, improper service, the fact that we have reversed the court's original decision does not mean that the sanctions award with respect to reargument must be reversed.

The imposition of Rule 11 sanctions is to be reviewed under an abuse-of-discretion standard. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). In *Virgin Atlantic*, we held that though the court had erred on the merits of a certain question, it nonetheless had discretion to impose sanctions against a federal agency for an attempt to reargue the question on the sole basis of intervening decisions of a district court in another circuit. We recognized that the district court had imposed sanctions for the agency's attempt to reargue a decided issue on the basis of insufficient new support, "not ... for the substance of its motion." *Virgin Atlantic* at 1255.

In the present case, despite the district court's repeated admonitions that Washburn's motion required the presentation of supporting affidavits and that frivolous filings could warrant sanctions, the motion to reargue lacked even the pretense of any new ammunition. (*See* Respondent's Memorandum Dated August 30, 1989, at 3: "[n]o new facts or affidavits are submitted and no new legal arguments are advanced".) Though the majority states that the district court "invited" the renewed motion, plainly the court did not invite it to be made on precisely the same papers as those on which it had just been denied. The district court's sanctions opinion, *New York State National Organization for Women v. Terry*, 732 F.Supp. 388 (S.D.N.Y. 1990) ("District Court Sanctions Opinion"), described the sequence. After rejecting counsel's original oral motion to dismiss on the grounds of improper service, "[t]he Court advised Washburn to submit a [402] motion in proper form, with supporting affidavits, if he wished to move to dismiss or quash service on behalf of respondents." *Id.* at

410. Counsel then submitted the motion in writing, but again without affidavits. In denying the written motion "without prejudice," "[t]he Court explained that the motion, as it was addressed to the issue of service, was inadequate in its present form, as there were no affidavits by any of respondents concerning service." Id. In connection with this explanation and again in granting an extension of time, the court cautioned that Rule 11 sanctions might be imposed if a renewed motion were frivolous. Nonetheless, in connection with Washburn's renewal of the written motion,

> "[n]o notice of motion was filed, nor were any supporting affidavits attached, despite the directive of the Court and the requirements of Civil Rule 3. No new arguments were advanced in the memorandum, with the exception of a section arguing that attorneys possess immunity from sanctions for their conduct, in a judicial proceeding and, therefore, that Rule 11 sanctions cannot be imposed upon them.

Id. Thus the court concluded that "[w]hile the Court does not impose sanctions lightly, an objective analysis of Washburn's conduct in resubmitting the motion without affidavits or additional support, and in substantially the same manner as it had been when previously denied by the Court, leads only to the conclusion that Washburn violated Rule 11." *Id.* at 412. On Washburn's motion to vacate the Rule 11 sanctions, the court stated that the "sanctions were not imposed for the filing of the original cross-motion, but only for the resubmission of the cross-motion without additional support." *New York State National Organization for Women v. Terry*, 737 F.Supp. 1350, 1366 (S.D.N.Y. 1990).

On this record, it is difficult for me to reconcile the majority's reversal of the imposition of sanctions against

Washburn with either the abuse-of-discretion standard of review established by the Supreme Court in *Cooter & Gell* or with our Court's decision in *Virgin Atlantic*.

B. *The Other Reargument Grounds that Elicited Sanctions*

Even if reversal on the merits of the original motion were a basis for reversing an award of sanctions for a repetitive attempt to reargue, in the present case the sanctions order should not be reversed outright because it was based on two additional rearguments by Washburn on which defendants have not prevailed on appeal. First, Washburn renewed the argument that the court lacked subject matter jurisdiction of the action. As a matter of principle, since that question was then pending on appeal, the district court could not revise it. Second, he argued that the district court did not have the power to hold defendants in contempt because defendants had appealed from the entry of the injunction whose terms they had flouted. In light of the fact that defendants had twice tried, once in the district court and once in this Court, to obtain a stay of the injunction and had twice been denied, defendant's renewed challenged to the court's power to hold them in contempt - like counsel's assertion that attorneys are immune from sanctions for frivolous court filings -was frivolous. Thus, on these two issues, the district court stated that "[t]he arguments advanced by Washburn were each previously rejected by the Court and, with the exception of the challenge to the manner of service ..., were each manifestly frivolous. When an attorney submits, or resubmits, a motion that he knew, or should have known, was meritless, Rule 11 sanctions are appropriate." District Court Sanctions Opinion, 732 F.Supp. at 412.

Imposition of sanctions on account of these frivolous challenges to the court's jurisdiction plainly was not an abuse of discretion. Accordingly, even if *Virgin Atlantic* did not exist as precedent, the most this Court could properly do is remand for the district court's consideration of whether to exercise its discretion to impose sanctions on these two bases alone, in light of the reversal on the merits of the service issue.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEW YORK STATE NATIONAL :
ORGANIZATION FOR WOMEN,
et al., :
Plaintiffs, 88 Civ. 3071
:
CITY OF NEW YORK, (R.J.W.)
:
Plaintiff-Intervenor,
:
-against-
:
RANDALL TERRY, et al.,
:
Defendants.

-- x

ORDER

Plaintiffs' Order to Show Cause, filed July 14, 1989, why respondent Christopher Slattery should not be held in contempt of this Court's Order granting a preliminary injunction, issued on October 27, 1988, and fined coercive civil sanctions for his actions of October 29, 1988 in Dobbs Ferry, New York, and why he should not be held in contempt of this Court's Order granting a permanent injunction, issued on January 10, 1989, and fined coercive civil sanctions for his actions of January 14, 1989 in New York, New York, having come on for hearing before the Court on November 7 and 8, 1990, the Honorable Robert J. Ward presiding, and the issues having been duly heard, and a decision having been rendered on November 8, 1990,

IT IS ORDERED AND ADJUDGED that respondent Christopher Slattery is fined coercive civil sanctions in the sum of $25,000, for his violation on January 14, 1989 of this Court's permanent injunction of January 10, 1989, which sum shall be paid forthwith into the Treasury of the United States.

IT IS FURTHER ORDERED AND ADJUDGED that respondent Slattery is fined coercive civil sanctions in the sum of $25,000 for his violation on October 29, 1988 of this Court's preliminary injunction of October 27, 1988, with regards to which $25,000, execution of judgment is stayed on condition that respondent will not violate the aforementioned orders at any time in the future.

IT IS FURTHER ORDERED AND ADJUDGED that in the event the Court finds a future violation of these orders, the Court would be prepared to vacate the stay of execution with respect to that portion of the judgment which imposes a $25,000 fine with respect to the events of October 29, 1988, in addition to imposing such further sanctions as would be independently warranted for any such future violations.

/s/ ROBERT J. WARD
Robert J. Ward

UNITED STATES DISTRICT JUDGE

Dated: New York, New York
November 8, 1990

APPENDIX F

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropoli-tan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; the Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition. Plaintiffs,

and

City of New York, Plaintiff-Intervenor,

v.

Randall TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants

who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071 (RJW).
United States District Court,
S.D. New York.
November 8, 1990

[207][1] THE COURT: What I had in mind to do, because obviously there are a number of matters which may well be the subject of an appeal, would be to incorporate by reference the court's determination of February 27, 1990 which then would permit the parties, not only Mr. Slattery but the others who are similarly situated, to join in their challenge in connection with the appeal which has been deferred pending the determination of this proceeding.

MR. HARRINGTON: That is acceptable to Mr. Slattery, you Honor.

THE COURT: Is that agreeable to the plaintiffs as well?

MS. HERNANDEZ: Yes, your Honor.

THE COURT: Very well.

THE COURT: This is the decision of the court. Plaintiffs moved by order to show cause to hold respondent, Christopher Slattery ("Slattery") in civil contempt of court for violating the orders of this court which prohibited blocking access to medical facilities which performed abortions. Plaintiffs also seek to recover the costs and attorneys' fees they incurred in bringing this contempt motion.

Slattery cross-moved for an order pursuant to **[208]** Rule 12(b)(1) and 6, Fed.R.Civ.P., dismissing this proceeding or alternatively for the denial of the relief requested by plaintiffs.

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[1] Bracketed numbers indicate page numbers from transcript of unreported decision. (Tr. pp. 207-21, November 8, 1990).

For the reasons that follow, the motion to hold Slattery in civil contempt is granted, and the cross-motion is in all respects denied.

Familiarity with this court's opinions dated October 27,1988, and January 20, 1989 is assumed. In addition, the court assumes familiarity with its opinion dated February 27, 1990 and incorporates by reference the background facts and legal discussion which affect respondent Slattery.

As has been noted in the prior opinions of this court, plaintiffs commenced this action in New York State Supreme Court on April 25, 1988 seeking injunctive and declaratory relief to restrain a number of defendants, not including Slattery, from blocking access to medical facilities providing abortions. The initial proceedings were in state court, and on April 28, 1988 a temporary restraining order issued signed by Justice Herman Cahn of the Supreme Court, New York County, which in its initial form did not expressly enjoin Operation Rescue from blocking access to health-care facilities.

On May 2, as a result of a demonstration in front of a physician's office at 154 East 85th Street in [209] Manhattan, where abortions are performed, a second temporary restraining order was issued by Justice Cahn that enjoined the defendants from, "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties from May 2, 1988 to May 7, 1988."

Defendants removed the action to this court on May 3, 1988. On May 4, this Court ruled that it would adopt and continue Justice Cahn's May 2, 1988 order and would modify it by:

(1) adding coercive sanctions of $25,000 for each day that the defendants violated the terms of the order; and,

(2) requiring defendants to notify the City of New York in advance of the location of any demonstration.

This court also ruled that failure to give such advance notice would make defendants liable for any resulting costs incurred by the city.

Numerous events transpired between May 4, and October 7, 1988 which are set forth in this Court's prior opinion, and are not necessary for the purpose of this decision.

On October 7, 1988, plaintiffs moved to modify the Court's prior injunction to cover the dates October 28, 29, and 31, in response to defendant's publicized plan [210] to conduct a "National day of rescue" at the end of October.

At the conclusion of an evidentiary hearing conducted on October 25 and 27, 1988, the Court granted plaintiff's motion and signed an order providing for appropriate preliminary relief.

Notwithstanding the issuance of the modified preliminary injunction on October 27 and the denial of a stay pending appeal, Operation Rescue organized and conducted two demonstrations on the morning of October 29, 1988 within the geographical area covered by the October 27 order.

From at least 8 a.m. till about 12:15 p.m. on October 29 approximately 250 Operation Rescue demonstrators blocked ingress to and egress from the Women's Pavilion medical clinic on Ashford Avenue in Dobbs Ferry, New York.

By this time, the Court's inunction had been extended to persons who aided and abetted the defendants, and it is plaintiffs' contention that Slattery is such a person.

The Court finds that on the evening of October 27, 1988, Slattery spoke to supporters of Operation Rescue at a rally and training session conducted at Glad Tidings Tabernacle Church. Slattery instructed the audience concerning the blockade which was to take place on October 29 in Dobbs Ferry, New York. He indicated that the [211] participants should bring with them approximately $20 together with identification, and that they should be prepared to be arrested.

He then explained how to blockade a clinic including an activity described as "scooching", which appears to be a sideways movement which takes place while an individual is sitting down. Scooching enables the filling of gaps in the blockade in the event blockaders are removed by the police.

In the early morning of October 29, Slattery appeared at St. Agnes Church in the Times Square area of Manhattan. He directed people to proceed to the blockade site which up to that point had not been disclosed publicly. He subsequently to into a car driven by a woman from Staten Island and directed the driver to Dobbs Ferry.

He arrived at Dobbs Ferry at approximately 8 a.m. on the morning of October 29, 1988, and remained in the vicinity of the Women's Medical Center for the next four hours.

At approximately 8:30 a.m., he was present when Kelli Conlin read this Court's injunction through a bullhorn. He was present approximately an hour later when a police office read the injunction through a bullhorn. At that time he was located approximately 15 feet from the police officer. The court has viewed a video tape of the [212] reading and notes that the reading was audible except for brief periods when the bullhorn appeared to malfunction.

In addition, the Court would note that, despite an earlier statement that he was unable to hear what was said, due to the noise of the crowd, the videotape, which contains an audio, clearly proved that the crowd was virtually silent during most if not all of the reading.

Accordingly the Court finds that, at the very least, Slattery had notice of the injunction between 8:00 and 9:30 a.m. on the morning of October 29, 1988.

Following this, Slattery, using a walkie-talkie and headset, assisted in supervising the demonstration. He communicated on the walkie-talkie with others, and in addition was involved with dealings with the media and the police.

At approximately 11:40 a.m., he participated in an arrangement which was made with the police that the demonstrators would leave the area of the clinic at approximately 12 noon and would not be arrested if they did so.

He is depicted in the videotape leading the demonstrators from the scene.

The Court finds that Slattery's activities on the morning of October 29, 1988 aided and abetted in the violation of this Court's prior orders, including the order [213] of October 27, 1988.

The second incident occurred on January 14, 1989 in front of the VIP Medical Associates Clinic located at 72 Fifth Avenue in Manhattan. Slattery does not contest that he participated in this demonstration, and that he had notice of this Court's orders of injunction.

The Court of Appeals in its decision in this case clearly outlined the applicable law governing civil contempt proceedings, stating in pertinent part, "A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing; and (3) the party has not diligently attempted in a reasonable manner to comply." 886 F.2d 1339 at 1351 (2d. Cir. 1989).

It is not necessary to show the party disobeyed the Court's order willfully *EEOC v. Local 638*, 753 F.2d 1172 at 1178 (2d. Cir. 1985).

Rule 65(d) Fed.R.Civ.P. provides that an injunctive order of the Court, "is binding only upon the parties to the action; their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Rule 65(d) prevents defendants from carrying out [214] prohibited activity through others who have actual notice of the Court's orders. *Regal Knitwear v. NLRB*, 324 U.S. 9, 14 (1945).

Thus, civil contempt sanctions may be assessed against non-parties who had have actual notice of the orders in effect at the time in question and participated with defendants in violating those orders.

Respondent has interposed his objection by a motion to dismiss pursuant to Rule 12(b)(1) and (6) Fed.R.Civ.P., asserting that this Court lacks jurisdiction to preside over these contempt proceedings, and he joins with the other respondents in arguing that the imposition of sanctions in the context of this case would be tantamount to criminal, not civil contempt. The Court has previously rejected these arguments when by others similarly situated, and rejects the arguments of Slattery as well.

The October 27, 1988 order with which we are principally concerned, clearly includes persons in the position of Slattery. For example, the October 27 order provided that "defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever acting in concert with them and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue'") participants are (1), enjoined and restrained .... And it is further ORDERED that the failure to comply [215] with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this order shall subject them to civil damages of $25,000 a day for any violations of this Order."

Similarly, the permanent injunction, which was in effect on January 14, 1989, defined Operation Rescue participants in the same manner as the October 27 order and provided that ... "The failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this order shall subject him or her to civil damages of $25,000 per day for the first violation of this order, and it is further ORDERED each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous order."

Both provisions more than adequately warned those acting in concert with the defendant that they will be subject to civil penalties of $25,000 per day for violations of these orders.

The orders fully satisfy the specificity requirements of Rule 65(d). See 886 F.2d at 1351-52.

Plaintiffs assert that Slattery is liable for $50,000 due to his active involvement with defendants in violating the Court's October 27 order and the permanent injunction. This amount is computed as follows:

(1) $25,000 for the demonstration in violation of [216] the October 27 order at Dobbs Ferry, New York on October 29, 1988.

(2) $25,000 for the demonstration in violation of the permanent injunction at the Margaret Sanger Clinic on January 14, 1989.

I am going to correct that. I have used the Sanger Clinic which is located on Second Avenue and 22nd Street. That demonstration took place on January 13 and is not before the Court. The January 14 demonstration was at the VIP Medical Associates Clinic in Manhattan. Any reference previously made to the site of the January 14, 1989 demonstration as being at the Margaret Sanger Clinic is amended. The location is as I have just indicated.

The Court found that Slattery had notice of the October 27 order and the preliminary injunction, and aided and abetted in the demonstration which blocked access to the Women's Pavilion Medical Center in Dobbs Ferry, and respondent having determined not to contest the issues of the notice and participation in the January 14, 1989 demonstration which blocked access to the VIP Clinic, leads the Court to find that it has been established by clear and convincing proof that Slattery acted in concert with defendants in violating the Court's orders in blocking access to clinics with knowledge of the October 27 order and the permanent injunction.

[217] Consequently, Slattery is adjudged in civil contempt of the October 27, 1988 order, and the permanent injunction and is assessed coercive civil penalties in the amount of $50,000.

Slattery contends that penalties of this amount are unduly harsh and burdensome from a financial perspective. He is 35 years of age, has a wife and two children. His present salary is approximately $36,000 a year, and at the present time, he possesses little else in the way of assets, although the Court would point out that the record contains evidence of transfers of property during the period of June and July 1989 subsequent to the events in question and at approximately the same time as the present order to show cause was signed by this Court.

Generally, the sanctions imposed after a finding of civil contempt serve two functions: to coerce future compliance and to remedy past noncompliance. *See generally United States v. United Mine Workers*, 330 U.S. 258, 302-04 (1947).

So far as the first of these functions is concerned, the District Judge sitting in equity is vested with wide discretion in fashioning a remedy. *Vuitton et Fils S.A. v. Carousel*

Handbags, 592 F.2d 126, 130 (2d Cir. 1979). *See*, for example, *Ingraham Co. v. Germanow*, 4 F.2d 1002, 1003 (2d Cir. 1925).

[218] By contrast, once a plaintiff proves that he has suffered harm because of the violation of the terms of an injunction, compensatory damages are appropriate.

In the present case, the plaintiffs have not demonstrated that compensatory damages are appropriate. Therefore, the remedy which the Court has determined to impose is in the nature of a fine payable to the Treasury of the United States. The Court has determined to impose a civil penalty of $25,000 with respect to the violation on October 29, 1988, and a penalty of $25,000 with respect to the violation on January 14, 1989.

Respondent has stated that he does not intend to violate this Court's orders at any time in the future. In view of this statement, and in view of respondent's financial condition, the Court suspends execution of the judgment with respect to the fine of $25,000 imposed in connection with the events of October 29, 1988 on condition that respondent will not violate the aforementioned orders at any time in the future.

In the event the Court finds a future violation of these orders, the Court would be prepared to vacate the stay of execution with respect to that portion of the judgment which imposes a $25,000 fine with respect to the events of October 29, 1988.

Attorneys' fees and costs: Plaintiffs seek [219] attorneys' fees and costs from Slattery to compensate them for their expenditures in bringing on the motion for contempt.

The permanent injunction expressly warned, "that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in enforcing this Order."

This additional penalty can properly be viewed as a coercive fine designed to insure compliance. An award of attorneys' fees and costs serves the compensatory purpose of civil contempt and avoids penalizing the complainant who is protected by the order for the actions of contemnors who purposely violate that order. *See Local 28 v. EEOC*, 478 U.S. 421, 444, Note 23 (1986); *Vuitton et Fils v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). (If the violation of the Court's orders is wilful, compensatory damages to the complainant should include reasonable costs for prosecuting the contempt including attorneys' fees.)

The evidence more than adequately demonstrates the intentional violation of this Court's orders by Slattery. Accordingly, Slattery is liable for the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him.

Plaintiffs are directed to serve and file within 20 days of the date of this decision an application [220] detailing their expenses including their attorneys' fees regarding the contempt proceedings, and respondents' cross motion.

The Court directs that an order be settled on notice.

That constitutes the Court's decision. Consistent with the direction of the Court of Appeals for this circuit, I am prepared to hear counsel with respect to any factual or legal errors or omissions.

Ms. Hernandez.

MS. HERNANDEZ: Your Honor, only with respect to the United Mine Workers provision respecting the responsibility in failing to take any action to insure that the Court order would be followed. The affirmative responsibility of someone in Mr. slattery's position, according to the United Mine Workers case.

THE COURT: I believe since I found that he essentially aided and abetted in the violation of this Court's order, that is sufficient. I would agree, since he acted as an instructor, was equipped with a walkie-talkie and headset, he did indeed occupy a supervisory role. To the extent the finding is necessary, I would supplement my decision by finding that although he was in a supervisory position, he did not act in a way to insure compliance with [221] this Court's orders, but instead aided and abetted in violating the orders of the Court.

Do you wish to be heard further?

MS. HERNANDEZ: No, your Honor. Thank you.

THE COURT: Mr. Harrington?

MR. HARRINGTON: Your Honor, I have nothing other than the arguments that we previously made.

THE COURT: Very well.

MR. HARRINGTON: Thank you.

THE COURT: Court is adjourned.

APPENDIX-G

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; the Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition, Plaintiffs,

and

City of New York, Plaintiff-Intervenor,

Randall TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071(RJW).

United States District Court,
S.D. New York
May 31, 1990.

[1354]** Center for Constitutional Rights (David Cole, Mary M. Gundrum, Rhonda Copelon, of counsel), Now Legal Defense and Educ. Fund (Alison C. Wetherfield, Sarah E. Burns, of counsel), New York City, for plaintiffs.

Michael E. Tierney, New York City, Rutherford Institute of Connecticut, Inc., Milford, Conn. (Joseph P. Secola, George J. Mercer, of counsel), for defendants.

A. Lawrence Washburn, Jr., New York City, for defendants and respondents Florence Talluto, Michael McMonagle, Michael La Penna, Jeff White.

John J. Broderick, Syosset, N.Y., for respondent Jesse Lee.

Kevin P. McGovern, Brooklyn, N.Y., for respondent Joseph Foreman.

Putney, Twombly, Hall & Hirson (John P. Hale, of counsel), New York City, for respondents Adelle and Bernard Nathanson.

Hogan & Traynor, (Richard J. Traynor, of counsel), Morristown, N.J., for respondent Robert Pearson.

ROBERT J. WARD, District Judge.

Plaintiffs move for an award of reasonable attorney's fees and costs against defendants pursuant to 42 U.S.C. § 1988 for services rendered in litigating this action from the spring of

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** Bracketed numbers indicate page numbers from decision reported at 737 F.Supp. 1350 (S.D.N.Y. 1990).

1988 through the spring of 1989. In addition, plaintiffs seek attorney's fees and costs against certain defendants and other individuals and organizations acting in concert with those defendants (collectively "respondents") who were adjudged in civil contempt of this Court's orders in an Opinion dated February 27, 1990 (the "February 27 Opinion"), 732 F.Supp. 388. Attorney A. Lawrence Washburn, Jr. ("Washburn") has filed a motion to vacate that portion of the February 27 Opinion which imposed sanctions against him under Rule 11, Fed. R. Civ. P. For the reasons that follow, plaintiffs' motion for an award of attorney's fees and costs against defendants under section 1988 and plaintiffs' application for attorney's fees and costs against the contemnors are granted in part and denied in part. Washburn's motion to vacate the imposition of Rule 11 sanctions is denied.

Background

In April 1988, plaintiffs filed suit against defendants claiming violations of 42 U.S.C. § 1985(3) and New York State law. Plaintiffs sought injunctive and declaratory relief to restrain defendants from blocking access to medical facilities providing abortions. On May 4, 1988, this Court issued an order ("the May 4 Order") which enjoined defendants from obstructing ingress into or egress from abortion facilities in the New York City area, and which provided for coercive fines of $25,000 for each day defendants violated the terms of the order. Defendants moved to vacate the May 4 Order for plaintiffs' alleged failure to comply with Rule 65(c), Fed. R. Civ. P. That motion was denied on May 6, 1988. Also on that date, the Court of Appeals denied defendants' application for a stay of the May 4 Order pending appeal.

On May 31, 1988, plaintiffs sought to have defendants adjudged in civil contempt for demonstrations held in violation of the May 4 Order on May 5 and 6, 1988. In an Opinion dated October 27, 1988 ("the October 27 Opinion"), this Court granted plaintiffs' motion, denied defendants' cross-motion to dismiss, and adjudged defendants Randall Terry ("Terry") and Operation Rescue in civil contempt of the May 4 Order for their activities during the May 5 and May 6 demonstrations. 697 F.Supp. 1324, 1338. Accordingly, a judgment was entered by the Court holding Terry and Operation Rescue jointly and severally liable for $50,000.00 in civil contempt sanctions to be paid to plaintiff, National Organization for Women ("N.O.W."). In addition a judg- **[1355]** ment was entered in the amount of $19,141.00 in favor of the City of New York for the costs it incurred as a result of defendants' failure to provide advance notice of either demonstration.

On October 7, 1988, plaintiffs moved to modify the Court's prior injunction to cover the dates October 28, 29 and 31, 1988, in response to defendants' publicized plan to conduct a "National Day of Rescue" at the end of October. At the conclusion of an evidentiary hearing conducted on October 25 and 27, 1988, the Court granted plaintiffs' motion and signed an order granting plaintiffs the modified preliminary relief they sought ("the October 27 Order"). Defendants' applications to the Court and to the Court of Appeals for a stay pending appeal of the October 27 Order were denied.

On December 21, 1988, plaintiffs moved for summary judgment and a permanent injunction upon receiving notice of blockades planned by Operation Rescue in the New York City area from January 12 to 14, 1989. These blockades had been organized in express retaliation for this Court's October 27 Opinion. 697 F.Supp. 1324. *See* Exhibit A, annexed to Affirmation of Mary M. Gundrum, filed December 21, 1988 (Letter from Randall Terry, dated November 16, 1988, urging participation in January blockades of "abortion mills" in the New

York City area in order to "face down" this Court). On January 6, 1989, the Court heard oral argument on plaintiffs' motion for summary judgment and defendants' motion to dismiss and, on January 10, 1989, the Court issued a permanent injunction that again enjoined defendants from blocking access to medical facilities offering abortions and included coercive sanctions of $25,000 per day for violations of the order (the "Permanent Inunction"). The Permanent Injunction was modified from the previous orders to provide that each successive violation of the injunction would result in doubling the civil contempt sanction applicable to the contemnor.

On January 20, 1989, the Court issued an opinion granting plaintiffs' motion for summary judgment on their common law trespass claim and on their 42 U.S.C. § 1985(3) federal cause of action and permanently enjoining Operation Rescue and its participants from blocking ingress into and egress from medical facilities providing abortion related services ("the January 20 Opinion").

Defendants appealed from the various orders entered by this Court. The Court of Appeals, in an Opinion dated September 20, 1989, affirmed this Court's rulings which, *inter alia*, (1) enjoined defendants from blocking access to clinics offering abortions, (2) held Terry and Operation Rescue in contempt for violation of the May 4 Order, and (3) imposed discovery sanctions on defendants. 886 F.2d 1339. The ruling regarding payment of the civil contempt sanctions was modified to provide that the coercive penalties for violations of the orders be payable into Court, not to plaintiff N.O.W. 886 F.2d at 1353. Defendants' petition for certiorari was denied by the Supreme Court on May 21, 1990. ____ U.S. ___, 110 S.Ct. 2206, 109 L.Ed.2d 532.

On June 9, 1989, plaintiffs moved by order to show cause to hold defendants Operation Rescue, Terry, Thomas Herlihy ("Herlihy") and respondents Bistate Operation Rescue Network ("B.O.R.N."), Jesse Lee ("Lee"), Joseph Foreman ("Foreman"), Michael McMonagle ("McMonagle"), Jeff White ("White"), Michael La Penna ("La Penna"), Florence Talluto ("Talluto"), Adelle Nathanson ("A. Nathanson"), Bernard Nathanson ("B. Nathanson") and Robert Pearson ("Pearson") in civil contempt for violating the May 4 Order, the October 27 Order and/or the Permanent Injunction.[1] The Court conducted a hearing on August 9, 10, 15 and 16, 1989 to determine factual issues disputed by respondents B. Nathanson, A. Nathanson and Pearson.

On February 27, 1990, the Court issued a decision granting in part and denying in part plaintiffs' motion for contempt. De-[1355]fendants Randall Terry and Operation Rescue were adjudged in civil contempt of the October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Defendant Herlihy was adjudged in civil contempt of the May 4 Order and assessed coercive civil penalties in the amount of $25,000. Respondent B.O.R.N. was adjudged in civil contempt of the October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee was adjudged in civil contempt of the May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman was adjudged in civil contempt of the May 4 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents McMonagle and White were adjudged in civil contempt of the Court's Permanent Injunction and each assessed coercive civil penalties in the amount of $25,000. Respondent La Penna was adjudged in civil contempt of the May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto was adjudged in civil contempt of the October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent A. Nathanson was adjudged in civil contempt of the October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson was adjudged in civil contempt of the Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent B. Nathanson was not adjudged in civil contempt.

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[1] Three additional individuals were initially named as respondents, but were not involved in the subsequent contempt proceeding.

The Court held that each of the contemnors was liable to plaintiffs for a pro rata share of the attorney's fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her, with the exception of those expenses associated with a renewed cross-motion to dismiss filed by Washburn on behalf of respondents Talluto, La Penna, White and McMonagle. The cross-motion to dismiss was denied and sanctions were imposed under Rule 11 against Washburn for refiling this frivolous motion in contravention of the Court's instructions. Washburn was held liable to plaintiffs for the attorney's fees and costs they incurred as a result of filing their motion for Rule 11 sanctions and responding to his renewed cross-motion to dismiss.

In their motion under section 1988, plaintiffs seek $306,423 in attorney's fees and $4,294.31 in costs. This requested fee award is based on a lodestar amount of $153,211.50 and a multiplier of 2.0. Defendants dispute the applicability of section 1988 to their conduct, take issue with the authenticity and clarity of certain of the time records produced by plaintiffs and argue that a multiplier is inappropriate.

In their application for attorney's fees and costs against the contemnors, plaintiffs seek to recover a total of $121,073.50. Respondents Talluto, La Penna, White and McMonagle argue that attorney's fees may only be awarded under section 1988, not as a consequence of their contempt, and that a fee award under section 1988 is improper in this case. Respondent A. Nathanson argues that she should not be liable for any attorney's fees because she was adjudged in contempt of only one of the two orders which plaintiffs' alleged she had violated. Respondent Pearson joins in this argument. Respondent B. Nathanson claims that he should be awarded his attorney's fees and costs because he was not found in contempt. No other opposition to the fee application has been filed.

Plaintiffs seek $11,712.47 for attorney's fees and costs incurred as a result of Washburn's violation of Rule 11. Washburn, in his motion to vacate the imposition of Rule 11 sanctions, argues that an evidentiary hearing was required before sanctions could be imposed, and challenges certain procedural steps taken by plaintiffs in pursuing their Rule 11 motion.

The Court will first discuss plaintiffs' entitlement to fees under section 1988, the reasonableness of the award they request and defendants' objections to this award. Next, the Court will address the reasonableness of plaintiffs' application for fees against the contemnors, and the objections [1357] raised by the contemnors to this fee request. Finally, the Court will consider Washburn's motion to vacate the imposition of Rule 11 sanctions and the reasonableness of the attorney's fees and costs requested by plaintiffs.

Discussion

A. *42 U.S.C. § 1988*

Pursuant to the Civil Rights Attorney's Fees Award Act of 1976, a district court, in its discretion, may award attorney's fees and costs to the prevailing party in any action or proceeding to enforce certain civil rights acts. 42 U.S.C. § 1988.[2]

1. *Entitlement to Fees-Plaintiffs as Prevailing Parties*

The statutory language of section 1988 creates a presumption in favor of fee awards, *Di Filippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985), and a prevailing party is ordinarily entitled to recover fees and costs unless there are special circumstances which would render such an award unjust. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966 19 L.Ed.2d 1263 (1968).

The Supreme Court has recently explained that a party meets the threshold requirement necessary to be considered a prevailing party under section 1988 if he or she succeeds on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989) (rejecting the "central issue" test for determining an award of attorney's fees). *See also, Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983).

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[2] Section 1988 states, in pertinent part, that: In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1988 has been interpreted in the same manner as the other fee-shifting provisions for particular civil rights claims which contain the "prevailing party" language. *See Independent Federation of Flight Attendants v. Zipes*, ___ U.S. ___, 109 S.Ct. 2732, 2735, n. 2, 105 L.Ed.2d 639 (1989).

> The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.
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> *Texas State Teachers Ass'n v. Garland Independent School District, supra*, 109 S.Ct. at 1493.

Defendants concede, as they must in light of the numerous legal issues decided in plaintiffs' favor and plaintiffs' success in obtaining a permanent injunction, that "it is clear that the plaintiffs are 'prevailing parties' and that defendants are 'losing parties.'" Memorandum of Law, filed March 16, 1990 at 6. They argue, however, that special circumstances exist which render a fee award in this case unjust. Specifically, defendants maintain that they are immune from an award of attorney's fees because, as a *per se* rule, activity in opposition to abortion is exempt from the application of section 1988, and their conduct was motivated by a true desire to oppose abortion. They also argue that they should be treated as civil rights plaintiffs for purposes of the fee shifting analysis.

No case authority has been cited by defendants in support of their position that the civil rights fee shifting statute contains an exemption for cases involving abortion, and the Court rejects this proposed *per se* ban. *See Haskell v. Washington Township*, 864 F.2d 1266, 1279 (6th Cir. 1988) (plaintiff entitled to fees under § 1988 in suit challenging zoning ordinances as infringing on right to abortion); *Planned Parenthood of Central and Northern Arizona v. Arizona*, 789 F.2d 1348, 1351-52 (9th Cir.) (plaintiff awarded fees under § 1988 after successfully challenging restrictions on the use of state funds for abortion-related services), *aff'd*, 479 U.S. 925, 107 S.Ct. 391, 93 L.Ed.2d 346 (1986); **[1358]** *Cf. Diamond v. Charles*, 476 U.S. 54, 69-70, 106 S.Ct. 1697, 1707-08, 90 L.Ed.2d 48 (1986) (intervenor lacked standing to contest the merits of a decision enjoining a state statute which attempted to restrict the availability of abortion, despite an award of attorney's fees against him under section 1988); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 494, 103 S.Ct. 2517, 2526, 76 L.Ed.2d 733 (1983) (judgment of lower court invalidating certain restrictions on abortion affirmed in part and reversed in part, and judgment awarding attorney's fees under section 1988 for all hours expended by plaintiffs' counsel remanded for further proceedings to determine a reasonable fee consistent with the dictates of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

Furthermore, the alleged or actual good faith of a defendant in carrying out the conduct which is found to violate the civil rights laws is not found to violate the civil rights laws is not sufficient to deny an attorney's fee award. *See Hutto v. Finney*, 437 U.S. 678, 693, 98 S.Ct. 2565, 2574, 57 L.Ed.2d 522 (1978); *Rose v. Heintz*, 806 F.2d 389, 391-92 (2d Cir. 1986). Consequently, the strength of defendants' convictions does not immunize them from the civil rights fee shifting statue.

Defendants have not attempted to demonstrate that any of their conduct was intended to further, or did further, the congressional civil rights policies behind 42 U.S.C. §§ 1981, 1982, 1983, 1985, or 1986, or Title IX of Public Law 92-318 or Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. § 1988. Therefore, defendants are not in a position analogous to losing civil rights plaintiffs, and the more stringent test for awarding fees against unsuccessful plaintiffs suing under the civil rights statutes is completely inapplicable to this case. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) (recovery of fees against an unsuccessful civil rights plaintiff appropriate only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation").

Similarly, defendants' argument against the award of fees finds no support in the Supreme Court's recent decision in *Independent Federation of Flight Attendants v. Zipes, supra*, 109 S.Ct. at 2732. In *Zipes*, the Supreme Court held that attorney's fees may be assessed against a blameless intervenor who was not found to be liable to a prevailing plaintiff only if the intervenor's action was "frivolous, unreasonable, or without foundation." *Id.* at 2736. The majority premised its holding on the need for a connection between liability for violation of federal law and liability of attorney's fees under the federal fee shifting statutes. *Id.* at 2737. In this case, of course, defendants have been held liable for violations of plaintiffs' civil rights. Thus, they can take no refuge in case law designed to shield from fee shifting those who have not violated the civil rights laws.

In sum, defendants enjoyed no civil or constitutional right to block access to the clinics in violation of the civil rights of plaintiffs. Nor did defendants have any arguable right willfully to disregard the orders of this Court and encourage others to do the same, especially when these orders were narrowly crafted to balance defendants' First Amendment rights with the rights of plaintiffs. *See* 886 F.2d at 1363-64.

Accordingly, the Court finds no special circumstances exist which would render an award of attorney's fees in this case anything but just.

The Court concludes that plaintiffs are prevailing parties under section 1988, entitled to an award of attorney's fees and costs.

2. *The Amount of the Section 1988 Fee Award*

The Supreme Court recently articulated the following summary of the legal standards for determining the amount of an appropriate fee award.

> A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, *i.e.*, "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," [1359] *[Blum v. Stenson*, 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 1547 n. 11, 79 L.Ed.2d 891 (1984)], and one that grants the successful civil rights plaintiff a "fully compensatory fee," [*Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983)], comparable to what is "traditional with attorneys compensated by a fee-paying client." S.Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913.

Missouri v. Jenkins, ___ U.S. ___, 109 S.Ct. 2463, 2470, 105 L.Ed.2d 229 (1989).

The lodestar method is used to establish the amount of an attorney's fees award under the federal civil rights fee shifting statute. *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 945, 103 L.Ed. 2d 67 (1989); *Hensley v. Eckerhart, supra*, 461 U.S. at 433, 103 S.Ct. at 1939. The lodestar is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation for each attorney involved. This calculation serves as a useful starting point for determining the amount of a reasonable fee, as it provides an objective basis on which to make an initial estimate of the value of a lawyer's services. *Hensley v. Eckerhart, supra*, 461 U.S. at 433, 103 S.Ct. at 1939.

The ultimate amount of the fee must be determined on the facts of each case, *id.* at 429, 103 S.Ct. at 1937, and the lodestar amount may be adjusted based on the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *E.g., Blanchard v. Bergeron, supra*, 109 S.Ct. at 943-45[3] Nevertheless, once the applicant for a fee award has established the reasonableness of the claimed rate and the number of hours expended, the resulting lodestar figure is presumed to be the reasonable fee to which counsel is entitled. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S.Ct. 3088, 3097, 92 L.Ed.2d 439 (1986) ("Delaware Valley I"); *Blum v. Stenson, supra,* 465 U.S. at 897, 104 S.Ct. at 1548.

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[3] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *E.g., Blanchard v. Bergeron, supra*, 109 S.Ct. at 943 n. 5 (citing *Johnson v. Georgia Highway Express, Inc., supra*, 488 F.2d at 717-19). Usually, however, most of these factors are subsumed within the initial lodestar calculation of hours reasonably expended at a reasonably hourly rate. *United States Football League v. National Football League*, 887 F.2d 408, 415 (2d Cir. 1989).

In this Circuit, an application for attorney's fees "should normally be disallowed unless accompanied by contemporaneous time records indicating, for each attorney, the date, the hours expended, and the nature of the work done." *New York State Association for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983). Contemporaneous time records are necessary so that the Court is not faced with an impossible task when asked to determine an appropriate fee amount, and lawyers are not required to expend even more time reconstructing the past in assembling the fee application. *Id.* at 1147-48. The burden to present such records to the Court rests squarely on the party requesting remuneration. *See Hensley v. Eckerhart, supra,* 461 U.S. at 437, 103 S.Ct. at 1941; *Carrero v. New York City Housing Authority*, 685 F.Supp. 904, 909 (S.D.N.Y. 1988).

a. *Reasonableness of hours requested*

Plaintiffs seeks reimbursement for 281.9 hours of work by Alison Wetherfield ("Wetherfield"), a staff attorney at the NOW Legal Defense and Education Fund, 330.5 hours of work by David Cole ("Cole"), an attorney for the Center for Constitutional Rights, and 247.25 hours of work by Mary M. Gundrum ("Gundrum"), a staff attorney at the Center for Constitutional Rights. They have not sought to recover for the work done by certain co-**[1360]**counsel, as, in their billing judgment, this time was duplicative. Nor have they sought fees for substantial time expended by law student interns in assisting in the preparation of this case.[4]

Defendants do not contest the amount of time requested for Wetherfield's efforts, and the Court finds this time amply documented and reasonable.

Defendants claim that plaintiffs have failed to supply contemporaneous time records for attorneys Gundrum and Cole. Both attorneys, however, have submitted affidavits in which they aver that contemporaneous time records were maintained, and that these records were replicated and submitted to the Court in support of the motion. *See* Declaration of David Cole, filed December 6, 1989 ¶ 6; Declaration of Mary M. Gundrum, filed December 6, 1989 ¶ 6. *Cf. United States Football League v. National Football League*, 704 F.Supp. 474, 477 (S.D.N.Y.) (re-typed computer records satisfied contemporaneous time record requirement), *aff'd*, 887 F.2d 408 (2d Cir. 1989).

Defendants have not attempted to submit evidence which calls into question the accuracy and reasonableness of the hours charged, or the facts asserted in the affidavits submitted by plaintiffs' attorneys. *See Blum v. Stenson, supra*, 465 U.S. at 892 n. 5, 104 S.Ct. at 1545 n. 5. As the Third Circuit has explained, when a party opposing a fee application

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[4] Plaintiffs have also excluded time spent inefficiently or on certain administrative tasks. *See* Declaration of Alison Wetherfield, filed December 6, 1989 at ¶ 6; Declaration of Mary M. Gundrum, filed December 6, 1989 at ¶ 6. In addition, the fee request does not include any time for which plaintiffs have already been compensated in connection with their earlier motion for fees pursuant to Rule 37(d), Fed.R.Civ.P.

> "has been afforded the opportunity to raise a material fact issue as to the accuracy of representations as to hours spent, or the necessity for their expenditure, and declines to do so, no reason occurs to us for permitting the trial court to disregard the uncontested affidavits filed by a fee applicant."

Northeast Women's Center v. McMonagle, 889 F.2d 466, 477 (3rd Cir. 1989) (citation omitted), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1788, 108 L.Ed.2d 790 (1990).

In addition, defendants argue only that the time records for attorneys Cole and Gundrum are vague, not that the time they expended was excessive. Contemporaneous time records are sufficiently detailed, however, if the "general subject matter of [the] time expenditures" are identified; "[p]laintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended." *Hensley v. Eckerhart, supra*, 461 U.S. at 437 n. 12, 103 S.Ct. at 1941 n. 12. The Court has reviewed the time records presented by plaintiffs for the work of attorneys Cole and Gundrum, and finds them sufficiently detailed to allow the Court objectively to evaluate the nature and reasonableness of the time expended.

In the Court's view, the total time requested by plaintiffs for the work of the three attorneys is reasonable in light of the circumstances under which they litigated this case. This action presented novel and difficult questions of law involving section 1985(3), and plaintiffs' skillful representation was instrumental in obtaining the success they achieved before this Court and the Court of Appeals.

Furthermore, the Court finds that plaintiffs' utilization of a team of attorneys was warranted given defendants' continual acts in violation of the Court's orders, the need to respond to these acts on short notice, the complexity of the issues involved, and the battery of counsel retained by defendants. *See Siegal v. Merrick*, 619 F.2d 160, 164 (2d Cir. 1980) (plaintiff's staffing conferences or court appearances with more than one lawyer may be warranted, especially when "confronted with a bevy of hostile lawyers for the multiple parties on the other side"); *McKever v. Vondollen*, 681 F.Supp. 999, 1002-03 (N.D.N.Y. 1988) (compensation for the use of multiple attorneys at trial reasonable). Indeed, defendants do not contend that plaintiffs' coun-**[1361]**sel failed to work efficiently, or that their work was duplicative.

Moreover, the confrontational and litigious posture adopted by defendants throughout much of this litigation placed heightened demands on plaintiffs' counsel, increasing the amount of time counsel needed to spend to defend plaintiffs' rights and monitor the enforcement of the Court's orders. Given the foregoing, the Court concludes that the number of hours for which plaintiffs seek compensation is reasonable.

b. *Reasonableness of rates*

Plaintiffs seek hourly rates of $160 for Wetherfield, $170 for Cole, and $210 for Gundrum. Defendants have not objected to the reasonableness of the rates suggested by plaintiffs.

Prevailing parties under the civil rights fee shifting statute are entitled to reasonable hourly rates which fall within the prevailing marketplace rates "in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson, supra*, 465 U.S. at 896 n. 11, 104 S.Ct. at 1547 n. 11.

Plaintiff's counsel all work for non-profit organizations which have not billed plaintiffs for their time. The suggested rates were arrived at by looking to the rates charged by major New York City law firms with litigation practices. This was proper, as in determining the elements of reasonable attorney's fees, courts have consistently looked to the marketplace as a guide, *Missouri v. Jenkins, supra*, 109 S.Ct. at 2470, and in determining whether the requested rates fall within the prevailing market rate, "rates charged in private representations may afford relevant comparisons." *Blum v. Stenson, supra*, 465 U.S. at 896 n. 11, 104 S.Ct. at 1547 n. 11. *See Miele v. New York State Teamsters Conference Pension & Retirement Fund*, 831 F.2d 407, 408-09 (2d Cir. 1987) (court may apply prevailing market rates for "Wall Street" associates to fee award for non-profit organization). As the work in this case spans only the past two years, it was also appropriate to use current, rather than historic rates. *See New York State Association for Retarded Children v. Carey, supra*, 711 F.2d at 1153.

The Court finds these rates to be reasonable, given the evidence presented by plaintiffs' of the rates charged by private law firms in New York City, counsel's experience in civil rights litigation, the high quality of counsel's representation and the degree of success counsel achieved in the lawsuit. *Cf. County of Suffolk v. Long Island Lighting Co.*, 701 F.Supp. 1477, 1481 (E.D.N.Y. 1989) (partners awarded between $175-275 per hour, associate awarded $175 per hour).

c. *Enhancement of the lodestar*

Plaintiffs argue that the lodestar should be enhanced by a multiplier of 2.0. Defendants oppose any enhancement.

The Supreme Court has explained that an enhancement of a fee award is proper only in certain and exceptional cases. *Delaware Valley I, supra*, 478 U.S. at 565, 106 S.Ct. at 3098; *Blum v. Stenson, supra*, 465 U.S. at 898-901, 104 S.Ct. at 1548-1550. *See also Krieger v. Gold Bond Building Products*, 863 F.2d 1091, 1099 (2d Cir. 1988). The purpose of the fee-shifting statute is not to replicate exactly a private fee arrangement, but to ensure that private parties will able to retain counsel to further the objectives of the civil rights statutes. *See Delaware Valley I, supra*, 478 U.S. at 565, 106 S.Ct. at 3098. The applicant bears the burden of overcoming the presumption that the lodestar reflects a reasonable fee award and establishing that an enhancement is appropriate. *See Soler v. G&U, Inc.*, 658 F.Supp. 1093, 1102-03 (S.D.N.Y. 1987).

Plaintiffs argue that an enhancement is warranted in this case to compensate their attorneys for the risk of loss associated with their representation. Plaintiff had no funds with which to retain counsel. Affirmation of Noreen Connell, filed January 24, 1990 at ¶ 3. Counsel agreed to represent them on a contingency fee basis, with compensation for their efforts dependent on plaintiffs' success on the merits of the civil rights claim and a [1362] statutory award of attorney's fees against defendants. *Id.*

Plaintiffs maintain that this contingency arrangement created a risk of loss which merits an enhancement of the lodestar.[5]

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[5] The question of whether a fee award under the fee shifting statutes can be enhanced for the risk of loss associated with contingent representation has divided the Supreme Court. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987) (plurality opinion reversing the enhancement of a fee award for contingency of success) ("Delaware Valley II").

In *Delaware Valley II*, four justices in the plurality (Chief Justice Rehnquist, and Justices White, Powell and Scalia) concluded that "enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee shifting statutes," *id.* at 727, 107 S.Ct. at 3087, and that even if such enhancement was permissible, it may occur only in "exceptional cases" where evidence is presented that "without risk enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Id.* at 730-31, 107 S.Ct. at 3089-90.

Justices Blackmun, Brennan, Marshall and Stevens dissented. They maintained that enhancement for contingency is appropriate when counsel is not able to mitigate the risk of nonpayment and when other economic risks are aggravated by the contingency arrangement. *Id.* at 747, 749, 107 S.Ct. at 3098, 3099 (Blackmun, J., dissenting).

Justice O'Connor, concurring, agreed with the four dissenting justices that enhancement for the risks of contingent representation is proper under the fee shifting statutes, but concluded that the record in the lower court did not support an enhancement. Therefore, she joined in the plurality opinion reversing the enhancement of the fee award. *Id.* at 734, 107 S.Ct. at 3091 (O'Connor, J., concurring).

(continued...)

In an of itself, the existence of a contingency arrangement is not a sufficient basis for increasing the amount of the fee award above the lodestar. *Lewis v. Coughlin*, 801 F.2d 570, 575 (2d Cir. 1986). Under certain circumstances, however, representing a client on a contingent basis creates a risk of nonpayment that may warrant an adjustment of the fee award to compensate the attorney for the assumption of this risk. *Id. See also Delaware Valley II; Wells v. Bowen*, 855 F.2d 37, 45 (2d Cir. 1988). The Second Circuit has explained that, in considering whether an enhancement is appropriate for the contingency factor, the rationale that should guide the court's discretion is whether without the possibility of a fee enhancement, competent counsel might refuse to represent civil rights clients thereby denying them effective assess to the court. *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298

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[5](...continued)

Justice O'Connor further agreed with the dissenters that "compensation for contingency must be based on the difference in market treatment of contingent fee cases *as a class*, rather than an assessment of the "riskiness" of any particular case." *Id.* at 731, 107 S.Ct. at 3089 (emphasis in the original). She noted, however, that contingency enhancements should be reserved for those situations where the "applicant can establish that without an adjustment for risk the 'prevailing party would have faced substantial difficulties in finding counsel in the local or relevant market,'" *id.* at 733, 107 S.Ct. at 3091 (quoting plurality opinion at 731, 107 S.Ct. at 3089), and that the fee applicant seeking an enhancement must bear the burden of proving the degree to which the relevant market compensates for contingency. *Id.*

Thus, a majority of the Supreme Court agreed that an enhancement of a fee award to compensate for the risk of loss inherent in a contingent fee relationship is permissible, at least under certain circumstances.

(2d Cir. 1987) (citing *Lewis v. Coughlin, supra*, 801 F.2d at 576).[6]

Plaintiffs initially encountered difficulty in securing representation from attorneys in private practice. Affirmation of Noreen Connell, *supra* at ¶ 2. No evidence has been presented, however, regarding the reasons these other attorneys refused to represent plaintiffs, or that without a fee enhancement for risk of loss private attorneys would be unwilling to undertake similar cases which ultimately further the objectives of the civil rights statutes. *Cf. Wilkinson v. Forst*, 729 F.Supp. 1416, 1419 (D. Conn. 1990) (25% enhancement justified given pervasive difficulties plaintiff encountered in attracting counsel). Furthermore, the Court has not been presented with evidence on how the relevant market [1363] compensates for contingency. *See Delaware Valley II*, 483 U.S. at 733, 107 S.Ct. at 3090-91 (O'Connor, J., concurring); *Meriwether v. Coughlin*, 727 F.Supp. 823, 829-30 (S.D.N.Y. 1989). Thus, an enhancement for risk of loss is not called for on the record in this case.

The lack of an enhancement is not meant in any way to disparage the outstanding representation afforded plaintiffs by their counsel, the degree of success achieved, or the contentious nature of the litigation plaintiffs undertook against multiple, obstreperous defendants. These factors, however, have already been taken into account in determining the reasonable fee award.

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[6] The Second Circuit stated that this rationale "is similar to that taken by the plurality and Justice O'Connor in [Delaware Valley II]." *Friends of the Earth v. Eastman Kodak Co., supra*, 834 F.2d at 298. The Court notes that this approach is also consistent with the purpose behind section 1988: "to make sure that competent counsel was available to civil rights plaintiffs." *Blanchard v. Bergeron, supra*, 109 S.Ct. at 944.

See Krieger v. Gold Bond Building Products, supra, 863 F.2d at 1099-1100.

d. *Costs*

Plaintiffs seeks to $4,294.31 in costs. Under the civil rights fee [illegible]ing statutes, a court will generally award "those reasonable out-of pocket expenses incurred by the attorney and which are normally charged fee paying clients." *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987) (quoting district court). A prevailing party may be reimbursed for expenditures which add to the proceeding and are not in part of the attorney's ordinary overhead. *See Carrero v. New York City Housing Authority, supra*, 685 F.Supp. at 909. Defendants have not challenged the reasonableness of the amount of costs requested, and the Court finds that plaintiffs have adequately detailed the breakdown of the costs incurred and that these expenditures were reasonable. *See Kuzman v. Internal Revenue Service*, 821 F.2d 930, 933-34 (2d Cir. 1987) (photocopying, telephone and postage expenses compensable).

Thus, the Court concludes that, under section, 1988, plaintiffs are entitled to an award of attorney's fees in the amount of $153,211.50 and costs in the amount of $4,294.31.

B. *Fee Application Against The Contemnors*

Plaintiffs seek a total of $121,073.50 in attorney's fees and costs from the contemnors as authorized by this Court's decision of February 27, 1990. This amount is broken down into two phases. The first phase lasted from approximately April 1989 until July 1989, during which time plaintiff's counsel collected evidence of the violations of this Court's orders and drafted plaintiffs' Order to Show Cause for Civil Contempt and supporting documents. This phase included service of process on all contemnors, an initial full day court appearance on July 28, 1989, when all counsel were present, and a court appearance on August 10, 1989, to address motions to dismiss. Plaintiffs have excluded from this phase all hours spent concerning those individuals named in the Order to Show Cause but not found in contempt. Plaintiffs assert, without contradiction, that the fees and costs incurred during this phase can fairly be assessed against all contemnors.

The second phase includes the time spent by plaintiffs in preparing for and conducting the evidentiary hearing on the contempt motion on August 9, 10, 15 and 16, 1989 against A. Nathanson, B. Nathanson and Pearson. This phase also includes hours expended drafting post-hearing submissions and a motion requesting that a portion of the transcript be stricken and sanctions be imposed on the Nathansons' attorney. Plaintiffs seek compensation for phase two fees and costs solely from those contemnors involved in the evidentiary hearing.

For phase one, plaintiffs seek compensation for 237.15 hours of Gundrum's time, 91.15 hours of Wetherfield's time and 17 hours expended by Cole. For phase two, plaintiffs seek compensation for 134.5 hours of Gundrum's time and 134.5 hours of Wetherfield's time. The rates requested are the same as those set forth in their application under section 1988. In addition, plaintiffs seeks reimbursement for $3,487.83 and $419.17 in costs for phase one and phase two, respectively. In total, plaintiffs' requests' request $70,889.33 for attorney's fees and costs for phase one and $50,184.17 for attorney's fees and costs for phase two.

[1364] The contemnors have not challenged the reasonableness of the time spent by plaintiffs' counsel, the rates sought, or the amount of costs incurred in either phase.

Plaintiffs have provided the court with documentation of the time and costs expended and the Court finds the time and costs reasonable under the circumstances.

Talluto, La Penna, White and McMonagle argue that the award of attorney's fees upon a finding of contempt was improper, despite their willful violations of this Court's orders, because they claim attorney's fees may only be awarded under section 1988 in a civil rights action. No relevant support has been supplied in support of this argument, and the Court rejects the notion that section 1988 in some way immunizes a contemnor from an award of attorney's fees, or abrogates the Court's authority to vindicate its own orders and compensate an aggrieved party for the expenses of defending those orders from purposeful violations.

A. Nathanson argues that she should not be liable for any of plaintiffs' attorney's fees or costs. She maintains that, because she prevailed on the allegation that she violated the May 4 Order she should be entitled to an award of fees for that count, and this should "wash" with the fees sought for her adjudged violation of the October 27 Order. Pearson joins in this argument. The Court disagrees.

While discharged contemnors may be able to recover "against the complainant for costs and disbursements and a reasonable counsel fee," any such award is committed to the discretion of the Court. Rule 43(d), Civil Rules of the United States Courts for the Southern and Eastern Districts of New York. Such an award is completely unwarranted here, as the evidence submitted in support of the allegations that A. Nathanson and Pearson violated the May 4 Order was not insubstantial, and supplied an adequate basis to support plaintiffs' filing of the motion against them.[7] Moreover, it was A. Nathanson's denial of the facts relating to her violation of the October 27 Order, and Pearson's denial of the facts relating to his violation of the Permanent Injunction, which resulted in much of the expense of the evidentiary hearing. Plaintiffs, whose rights were violated, should not be forced to bear the costs of vindicating those rights and enforcing the Court's orders.

The Court agrees, however, that A. Nathanson and Pearson, as well as the other contemnors, should only be required to bear the costs associated with the violation or violations they were found to have committed. Accordingly, each contemnor was made liable only for "a pro rata share of the attorney's fees and cost incurred by plaintiffs as a result of bringing the contempt motion against him or her." February 27 Opinion, at 54. The Court now turns to determine the pro rata share for each contemnor.

1. *Allocation of Phase One Fees and Costs*

The Court believes it is appropriate to assess the total attorney's fees and costs incurred against all contemnors in phase one in accordance with the number of days each contemnor was found to have violated the Court's orders, out of the number of violations alleged by plaintiffs.[8] For phase one, plaintiffs alleged that the contemnors, collectively, committed a total of twenty-two (22) violations of the Court's orders. The Court found twenty (20) distinct viola-[1365]tions had occurred in its February 27 Opinion. The pro rat share of the phase one fees and costs for each contemnor is as follows:

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[7] Similarly, in the Court's view B. Nathanson's request for fees is unwarranted, as the evidence adduced regarding plaintiffs' claim that he knowingly violated the Permanent Injunction presented a close factual question.

Contemnor	Number of Violations Found	Percentage of Violations Alleged
Terry & Operation Rescue	4	18.2%
Herlihy	1	4.5%
B.O.R.N.	1	4.5%
Lee	4	18.2%
Foreman	2	9.1%
McMonagle	1	4.5%
White	1	4.5%
Talluto	2	9.1%
La Penna	2	9.1%
A. Nathanson	1	4.5%
Pearson	1	4.5%

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[8] Plaintiffs suggest that the Court apportion the phase one fees and costs according to each contemnor's percentage share of the overall fines imposed. Because fines were not imposed for every violation that contemnors were found to have committed, and because successive violations of the Permanent Injunction resulted in a doubling of the fine, the Court believes that the measure it has followed better imposes upon the various contemnors a pro rata share of the attorney's fees and costs incurred as a consequence of their willful violations of the Court's orders.

The $70,889.33 in phase one fees and costs is apportioned as follows:

Contemnor	Percentage	Amount
Terry & Operation Rescue	18.2%	$12,901.86
Herlihy	4.5%	$ 3,190.02
B.O.R.N.	4.5%	$ 3,190.02
Lee	18.2%	$12,901.86
Foreman	9.1%	$ 6,450.93
McMonagle	4.5%	$ 3,190.02
White	4.5%	$ 3,190.02
Taliuto	9.1%	$ 6,450.93
La Penna	9.1%	$ 6,450.93
A. Nathanson	4.5%	$ 3,190.02
Pearson	4.5%	$ 3,190.02

2. *Allocation of Phase Two Fees and Costs*

The Court believes it is appropriate to apportion the phase two attorney's fees and costs among these contemnors involved in those proceedings based on the number of violations they were found to have committed out of the number of violations alleged by plaintiffs.[9] Five (5) distinct violations of the Court's orders were at issue during phase two, two (2) violations each charged to A. Nathanson and Pearson, and one (1) violation charged to B. Nathanson. Inasmuch as A. Nathanson and Pearson were each adjudged in contempt on one violation, the each must bear one-fifth ($^{1}/_{5}$) or twenty percent (20%) of the total phase two attorney's fees and costs incurred by plaintiffs.

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[9] Plaintiff's suggest that A. Nathanson and Pearson should each be liable for one-third ($^1/_3$) of the phase two fees and costs, and do not seek compensation for the remaining one-third ($^1/_3$) attributable to B. Nathanson. The Court, however, believes it is more equitable to apportion the fees and costs, according to the violations proved by plaintiffs, rather than the number of respondents involved, as this method reflects that A. Nathanson and Pearson were successful in defending against the allegations that they violated the May 4 Order.

The Nathansons argue that the total phase two award should not include attorney's fees expended with regard to the [1366] unsuccessful motion for sanctions asserted by plaintiffs against the Nathansons' attorney. The Court agrees. Accordingly, the phase two attorney's fees will be reduced by 21.4 hours, the time spent by Alison Wetherfield in drafting that motion, leaving a total request for phase two of $46,760.17. These phase two fees are apportioned as follows:

Contemnor	Percentage	Amount
A. Nathanson	20%	$9,352.03
Pearson	20%	$9,352.03

Accordingly, the total share of the fees and costs incurred during phase one and phase two for which A. Nathanson and Pearson are each liable is $12,542.05.

C. *Washburn's Motion to Vacate the Imposition of Rule 11 Sanctions*

The Court found that Washburn's conduct in resubmitting a cross-motion to dismiss which had previously been rejected by the Court, after having been repeatedly warned that the resubmission of the cross-motion without additional support would expose him to the risk of Rule 11 sanctions, was vexatious and warranted sanctions. February 27 Opinion 732 F.Supp. at 412.

Washburn argues that an evidentiary hearing was required before sanctions could be imposed in order to test the extent of his inquiry into the legal positions the Court found to be frivolous. From this argument it is apparent that he misconstrues the basis for the imposition of sanctions. While the Court did find that many of the arguments he raised in the cross-motion to dismiss were manifestly frivolous, Rule 11 sanctions were not imposed for the filing of the original cross-motion, but only for the resubmission of the cross-motion without additional for support. After the initial cross-motion was denied Washburn was explicitly warned that sanctions might result if he further burdened plaintiffs and the Court by resubmitting the cross-motion without additional support. No disputed factual issues were involved in determining whether the resubmission of the motion violated an objective standard of reasonableness. Thus, an evidentiary hearing was not required.

Washburn also maintains that the imposition of sanctions should be vacated because the Rule 11 motion was (1) withdrawn by plaintiffs, (2) prematurely filed, and (3) improperly served. None of these arguments have merit, and the Court will address them only briefly.

In a letter to the Court, dated November 8, 1989, plaintiffs' counsel responded to Washburn's Memorandum and Affidavit in Opposition to the Rule 11 motion.[10] Washburn asserts that, in this letter, plaintiff's sought to withdraw their Rule 11 motion and therefore the Court should not have ruled on it. A fair reading of the letter, however, provides no support for such a conclusion. To the contrary, it is clear that the letter was intended to serve as plaintiffs' reply to the opposition papers Washburn had filed, and that plaintiffs' were not seeking to withdraw their Rule 11 motion.[11]

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[10] Washburn's submissions in opposition to the Rule 11 motion were received by the Court, first in handwritten and then in typed form, during October and November 1989, and the Court considered and rejected the arguments raised therein prior to imposing Rule 11 sanctions.

In fact, the letter set forth the return date of the Rule 11 motion and indicated that no oral argument was requested or scheduled to occur. Plaintiffs, in concluding the letter, responded to Washburn's argument that the Rule 11 motion was prematurely filed because the Court had not yet found the resubmission of the motion to be frivolous, by requesting that "the Court first consider Mr. Washburn's re-[1367]newed motion and then plaintiff's motion for sanction." This, of course, reflected only an acknowledgment of the process which the Court would necessarily follow prior to ruling on the Rule 11 motion, and in no way altered the fact that the parties had a full opportunity to present their arguments regarding the Rule 11 motion, and did present these arguments in their submissions to the Court.

Finally, Washburn's motion to vacate the imposition of sanctions indicates that he was properly served with the Rule 11 motion, and any complaints that other parties may have regarding service of the Rule 11 motion are inapposite.

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[11] That plaintiffs wished to continue to pursue their Rule 11 motion is clear from the opening lines of the letter, where plaintiffs explain that they "wish to rest on the legal arguments in their memorandum dated September 22, 1989" and "write this letter only to clarify confusions raised by Attorney Washburn's Rule 11 Memorandum and Affidavit in Opposition."

Thus, there is no basis for the Court to vacate the imposition of Rule 11 sanctions, and Washburn's motion is denied.

1. *The Amount of the Sanction*

The Court imposed Rule 11 sanctions against Washburn in the amount of the attorney's fees and costs reasonably incurred by plaintiffs in responding to his renewed cross-motion to dismiss and in filing their motion for sanctions. February 27 Opinion at 50. Plaintiffs seek $11,712.47 for fees and costs.[12] They have detailed these expenses in their application for attorney's fees against the contemnors, and Washburn has not challenged the number of hours expended, the rates sought by the attorneys involved, or the overall reasonableness of the amount requested. Inasmuch as plaintiffs have adequately documented their time and expenditures, the Court will not modify the amount requested. *Cf. Northeast Women's Center v. McMonagle, supra,* 889 F.2d at 477. Thus, Washburn is liable to plaintiffs for $11,712.47 in attorney's fees and costs as a sanction under Rule 11.

CONCLUSION

Plaintiffs are prevailing parties under 42 U.S.C. § 1988 entitled to an award of attorney's fees and costs from defendants. Their motion for attorney's fees under section 1988 is granted to the extent that defendants are liable for $153,211.50 in attorney's fees and $4,294.31 in costs. Plaintiff's fee application against the various contemnors pursuant to the Court's February 27 Opinion is granted to the extent that fees and costs are awarded against the various contemnors in the following amounts:

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[12] Plaintiffs seek to recover for seven hours of work by Wetherfield, 39.25 hours of work by Gundrum, and 21 hours of work by attorney Elizabeth Malcolm ("Malcolm"), a volunteer attorney at the NOW Legal Defense and Education Fund. Plaintiffs request an hourly rate of $110 for Malcolm's time, which is consistent with the prevailing marketplace rates for attorneys with comparable experience in private practice.

Terry & Operation Rescue	$12,901.86
Herlihy	$ 3,190.02
B.O.R.N.	$ 3,190.02
Lee	$12,901.86
Foreman	$ 6,450.93
McMonagle	$ 3,190.02
White	$ 3,190.02
Talluto	$ 6,450.93
La Penna	$ 6,450.93
A. Nathanson	$12,542.05
Pearson	$12,542.05

Washburn's motion to vacate the imposition of Rule 11 sanctions against him is denied. Washburn is liable to plaintiffs for $11,712.47 in attorney's fees and costs incurred as a result of his conduct in violation of Rule 11.

Settle orders on notice.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-- x

NEW YORK STATE NATIONAL :
ORGANIZATION FOR WOMEN,
et al., :
Plaintiffs,
: ORDER
CITY OF NEW YORK,
:
Plaintiff-Intervenor,
: 88 Civ. 3071 (RJW)
-and-
:
UNITED STATES OF AMERICA,
:
Judgment Creditor,
:
-against-
:
RANDALL TERRY, et al.,
:
Defendants.
-- x

Plaintiff's Order to Show Cause as to why certain named defendants and respondents should not be found in civil contempt of this court's orders, which was filed June 9, 1989, came on for hearing before the Court, Honorable Robert J. Ward, District Judge, presiding, and the issues having been duly heard on August 9, 10, 15 and 16, 1989 and a decision having been rendered on February 27, 1990.

IT IS ORDERED that the United States of America, as Judgment Creditor, recover of defendants and respondents as follows:

Defendants Randall Terry and Operation Rescue are adjudged in civil contempt of this Court's October 27 Order and Permanent Injunction and are assessed coercive civil penalties in the amount of $100,000. Defendant Thomas Herlihy is adjudged in civil contempt of this Court's May 4 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Bistate Operation Rescue Network ("B.O.R.N.") is adjudged in civil contempt in this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Jesse Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Joseph Foreman is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents Michael McMonagle and Jeff White are adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Michael LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Florence Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Robert Pearson is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000.

Dated: New York, New York
May 8th, 1990

/s/ ROBERT J. WARD
Robert J. Ward

U.S. District Court Judge

APPENDIX I

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition, Plaintiffs,

and

City of New York, Plaintiff-Intervenor,

v.

Randall TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071 (RJW).
United States District Court,
S.D. New York,
Feb. 27, 1990.

[392][1] Center for Constitutional Rights (David Cole, Mary M. Gundrum and Rhonda Copelon, of counsel), Now Legal Defense and Educ. Fund (Alison Wetherfield and Sarah Burns, of counsel), and Rabinowitz, Boudin, Lieberman, Standard and Krinsky, P.C. (Judith Levin, of counsel), New York City, for plaintiffs.

Corp. Counsel for the City of New York (Peter Zimroth, Hilary Weisman and Lorna Goodman, of counsel), New York City, for plaintiff-intervenor.

Michael E. Tierney, New York City, and Rutherford Institute of Connecticut, Inc. (Joseph P. Secola, George J. Mercer, of counsel), Milford, Conn., for defendants.

A. Lawrence Washburn, Albany, N.Y., for defendants and respondents Florence Talluto, Michael McMonagle, Michael LaPenna and Jeff White.

John J. Broderick, Syosset, N.Y., for respondent Jesse Lee.

Kevin P. McGovern, Brooklyn, N.Y., for respondent Joseph Foreman.

Putney, Twombly, Hall & Hirson (John P. Hale, of counsel), New York City, for respondents Adelle and Bernard Nathanson.

Hogan & Traynor (Richard J. Traynor, of counsel), Morristown, N.J., for respondent Robert Pearson.

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[1] Bracketed numbers indicate page numbers from decision reported at 732 F. Supp. 388.

ROBERT J. WARD, District Judge.

Plaintiffs moved by order to show cause to hold certain defendants and other individuals and organizations acting in concert [393] with those defendants (collectively "respondents") in civil contempt of court for violating the temporary restraining order, the preliminary injunction and/or the permanent injunction in this action. These orders prohibited blocking access to medical facilities which performed abortions. Plaintiffs also seek to recover the costs and attorneys fees they incurred in bringing this contempt motion. A myriad of related motions have been filed by the parties to this proceeding and a previously denied cross-motion to dismiss the motion for contempt has been renewed by certain respondents. In response, plaintiffs filed a motion for the imposition of Rule 11 sanctions against attorney A. Lawrence Washburn ("Washburn"), claiming that the renewed cross-motion is frivolous. Plaintiffs also filed a motion to strike a portion of the record in the hearing conducted by the Court in these contempt proceedings, and for the imposition of sanctions pursuant to 28 U.S.C. § 1927, against attorney John P. Hale ("Hale"), counsel for respondents Adelle and Bernard Nathanson.

For the reasons that follow, the motion to hold defendants and respondents in civil contempt is granted in part and denied in part, the renewed cross-motion to dismiss is denied, the motion for the imposition of Rule 11 sanctions against Washburn is granted, and the motion to strike the record and impose sanctions on Hale is granted in part and denied in part.

BACKGROUND

Plaintiffs commenced this action in New York State Supreme Court on April 25, 1988, seeking injunctive and declaratory relief to restrain defendants from blocking access to medical facilities providing abortions.[1] Defendants had organized and publicized a week of protests called "Operation Rescue" to be carried out in the New York City area from April 30 until May 7, 1988. According to defendants' plan, protestors each day would converge on a facility at which abortions were performed in an effort to close down the facility. The target facility each day was not to be disclosed in advance.

By order to show cause, plaintiffs sought to enjoin defendants, for the duration of the planned "Operation Rescue," from obstructing access to any facility at which abortions were performed in New York City and the surrounding counties. On April 28, 1988, a temporary restraining order ("TRO") was issued by Justice Cahn of the New York State Supreme Court, New York County, which did not expressly enjoin Operation Rescue from blocking access to health care facilities. On May 2, as a result of a demonstration in front of a physician's office at 154 East 85th Street in Manhattan where abortions are performed, a second TRO was issued by Justice Cahn that enjoined defendants from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester Counties from May 2, 1988 to May 7, 1988."

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[1] The history of this action is recounted in two prior published opinions of this Court, the first, dated October 27, 1988, and reported at 697 F.Supp. 1324 (1988) (holding defendants Randall Terry and Operation Rescue in civil contempt for violation of the Court's May 4, 1988 order), and the second, dated January 20, 1989, and reported at 704 F.Supp. 1247 (1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), as well as in the Second Circuit's opinion, dated September 20, 1989, and reported at 886 F.2d 1339 (2d Cir. 1989) (affirming the Court's various orders in this action as modified to provide that contempt fines were to be paid into the court, not to plaintiffs).

On May 3, 1988, Operation Rescue, led by Terry conducted a demonstration in front of a clinic in Queens, New York, during which several hundred demonstrators were arrested for blocking ingress to and egress from the clinic. Statement of Stipulated Facts, filed May 4, 1988 ¶¶ 3, 10. On the afternoon of May 3, 1988, Justice Cahn conducted a further hearing on the matter, during the course of which defendants removed the action to this Court. A hearing was scheduled to be conducted before this Court in the late afternoon of the following day, May 4, 1988.

After argument by the parties, this Court ruled on May 4, 1988, that it would adopt and continue Justice Cahn's May 2, [394] 1988 order, and would modify it by (1) adding coercive sanctions of $25,000.00 for each day that defendants violated the terms of the order, and (2) requiring defendants to notify the City in advance of the location of any demonstrations ("the May 4 Order"). This Court also ruled that failure to give such advance notice would make defendants liable for any resulting costs incurred by the City. Defendant Terry was notified of this Court's action by his attorney on the evening of May 4, and the Court signed the May 4 Order the following morning. Second Statement of Stipulated Facts, filed July 19, 1988 ¶ 1.

Defendants moved to vacate the May 4 Order for plaintiffs' alleged failure to comply with Rule 65(c), Fed.R.Civ.P. That motion was denied by this Court on May 6. Also on the same date, the Court of Appeals denied defendants' application for a stay of the May 4 Order pending appeal.

On Thursday morning, May 5, 1988, Operation Rescue demonstrators sat on the sidewalk in front of the Women's

Choice Clinic, where abortions are performed, at 17 W. John Street, Hicksville, Long Island. The demonstrators blocked ingress to and egress from the clinic for approximately three hours. *Id.* ¶ 3.

On Friday morning, May 6, 1988, Operation Rescue demonstrators returned to the same site where they had demonstrated on Monday, May 2, at 154 East 85th Street, Manhattan, once again blocking access to the physician's office. *Id.* ¶ 4. Defendant Terry personally participated in physically blocking access to the abortion facility during the May 6 demonstration and was arrested. Third Statement of Stipulated Facts, filed July 26, 1988 ¶ 5. The terms of the May 4, Order were read aloud by the New York City police before arrests began. *Id.* ¶ 7.

At no time after he received notice of the May 4 Order did defendant Terry direct demonstrators to obey the Order, nor did he at any time alter his prior written instructions to Operation Rescue participants that their goal must be to block access to abortion facilities. *Id.* ¶ 6. Defendant Terry, however, communicated the terms of the Court's May 4 Order to the demonstrators at the May 6, 1988 demonstration. *Id.* Approximately 320 Operation Rescue demonstrators were arrested that day. *Id.* ¶ 7.

On May 31, 1988, plaintiffs sought civil contempt sanctions against defendants pursuant to Rule 70, Fed.R.Civ.P. and 18 U.S.C. § 401 (1982), as a consequence of the events of May 5 and 6. In an Opinion dated October 27, 1988 ("the October 27 Opinion"), the Court granted the motion, denied defendants' cross-motion to dismiss, and adjudged defendants Terry and Operation Rescue in civil contempt of the May 4 Order for their activities during the May 5 and May 6 demonstrations. 697 F.Supp. 1324, 1338. Accordingly, a judgment in the amount of $50,000.00 was entered by the Court holding Terry and Operation Rescue jointly and severally liable for $50,000.00 in civil contempt sanctions to be paid to plaintiff, National Organization for Women ("N.O.W."), and a judgment was entered in the amount of $19,141.00 in favor of the City for the costs that resulted from defendants' failure to provide advance notice of either demonstration. The relief granted in the Court's October 27 Opinion was expressly "without prejudice to plaintiffs' right to proceed against defendants Herlihy and Lisante, or against any other individuals who violated the Court's Order with notice." 697 F.Supp. at 1338.

On October 7, 1988, plaintiffs moved to modify the Court's prior injunction to cover the dates October 28, 29 and 31, 1988, in response to defendants' publicized plan to conduct a "National Day of Rescue" at the end of October. At the conclusion of an evidentiary hearing conducted on October 25 and 27, 1988, the Court granted plaintiffs' motion and signed an order granting plaintiffs the modified preliminary relief they sought ("the October 27 Order"). Defendants' applications to this Court and to the Court of Appeals for a stay pending appeal of the October 27 Order were denied.

Notwithstanding the issuance of the modified preliminary injunction on October 27 and the denial of the requested stay, Operation Rescue organized and conducted [395] two demonstrations on the morning of October 29, 1988, within the geographical area covered by the October 27 Order. From at least 8:00 a.m. until about 12:15 p.m. on October 29, approximately 250 Operation Rescue demonstrators blocked ingress to and egress from the Women's Pavilion medical clinic on Ashford Avenue in Dobbs Ferry, New York. Exhibits A, H & I, annexed to Affirmation of Mary M. Gundrum, filed December 21, 1988 ("Gundrum Aff."); Exhibit 37, annexed to

Declaration of Mary Gundrum, filed June 9, 1989 ("Gundrum Decl."). From at least 8:00 a.m. until about noon on October 29, approximately 130 Operation Rescue demonstrators blocked access to the Women's Pavilion medical clinic on Deer Park Avenue in Deer Park, Suffolk County, New York. Exhibits A & J, annexed to Gundrum Affidavit; Exhibit 37, annexed to Gundrum Decl. Both clinics provide abortions and family planning counseling.

On December 21, 1988, plaintiffs moved for summary judgment and a permanent injunction upon receiving notice of blockades planned by Operation Rescue in the New York City area from January 12 to 14, 1989. These blockades had been organized in express retaliation for this Court's October 27 Opinion. 697 F.Supp. 1324. *See* Exhibit A, annexed to Gundrum Aff. (Letter from Randall Terry, dated November 16, 1988, urging participation in January blockades of "abortion mills" in the New York City area in order to "face down" this Court). On January 6, 1989, the Court heard oral argument on plaintiffs' motion for summary judgment and defendants' motion to dismiss and, on January 10, 1989, the Court issued a permanent injunction that again enjoined defendants from blocking access to medical facilities offering abortion and included coercive sanctions of $25,000 per day for violations of the order (the "Permanent Injunction"). The Permanent Injunction was modified from the previous orders to provide that each successive violation of the injunction would result in doubling the civil contempt sanction applicable to the contemnor.

Notwithstanding the issuance of the Permanent Injunction, once again Operation Rescue organized and led demonstrations which blocked access to clinics offering abortion. On January 13, 1989, Terry and other Operation Rescue leaders led several hundred persons to block access to and from the Margaret Sanger Planned Parenthood Clinic at 380 Second

Avenue in Manhattan, a facility that performs abortions (the "Margaret Sanger Clinic"). Exhibits 17 & 26, annexed to Gundrum Decl. Police Inspector James Helbock read the permanent injunction to the demonstrators using a bullhorn, before approximately 275 demonstrators were arrested. Exhibit 26, annexed to Gundrum Decl. Terry, using a bullhorn as well, instructed demonstrators to lock arms and prevent police officers from reaching the building entrance, and to engage in "total, complete non-cooperation" with the police. *Id.*

On January 14, 1989, Operation Rescue demonstrators again blocked all access to the Margaret Sanger Clinic. As happened during the previous day's demonstration, police officers read the Permanent Injunction to the demonstrators blocking access to the clinic before beginning arrests. Exhibits 28, 31, 26, 30 & 29, annexed to Gundrum Decl. Also on January 14, 1989, demonstrators blocked access to five other clinics in the New York City area which provide abortions. These demonstrations occurred at (1) the Manhattan Women's Medical Clinic, located at 115 East 23rd Street in Manhattan; (2) the VIP Medical Associates Clinic, located at 72 Fifth Avenue in Manhattan; (3) the Lincoln Women's Service Clinic, located at 1995 Broadway, Manhattan; (4) the Park Med Clinic, located on the 12th floor of 475 Park Avenue South in Manhattan; (5) the Eastern Women's Center, located at 38 East 30th Street in Manhattan. Exhibits 1, 31, 18, 33, 30, 29 & 21, annexed to Gundrum Decl. Operation Rescue claimed responsibility for organizing and conducting these demonstrations in literature it disseminated to its participants. Exhibit 1, annexed to Gundrum Aff.

On January 20, 1989, the Court issued an opinion granting plaintiffs' motion for summary judgment on their common law trespass [396] claim and on their 42 U.S.C. § 1985(3) federal cause of action and permanently enjoining

Operation Rescue and its participants from blocking ingress into and egress from medical facilities providing abortion related services ("the January 20 Opinion").

Defendants appealed from the various orders entered by this Court. The Court of Appeals, in an Opinion dated September 20, 1989, affirmed this Court's ruling which, *inter alia*, (1) enjoined defendants from blocking access to clinics offering abortions, (2) held Terry and Operation Rescue in contempt of violation of the May 4 Order, and (3) imposed discovery sanctions on defendants. 886 F.2d 1339. The Court's ruling regarding payment of the civil contempt sanctions was modified to provide that the coercive penalties for violations of the orders be payable into the Court, not to plaintiff N.O.W. 886 F.2d at 1353.

The instant motion for contempt

Plaintiffs' application for contempt relates to four days of blockades of facilities performing abortions: May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. Plaintiffs seek contempt sanctions against the following organizations and persons:

Defendants:
- Operation Rescue
- Randall Terry ("Terry")
- Thomas Herlihy ("Herlihy")

Respondents:[2]

Bistate Operation Rescue Network
("B.O.R.N.")
Jesse Lee ("Lee")
Joseph Foreman ("Foreman")
Michael McMonagle ("McMonagle")
Jeff White ("White")
Michael LaPenna ("LaPenna")
Florence Talluto ("Talluto")
Adelle Nathanson ("A. Nathanson")
Bernard Nathanson ("B. Nathanson")
Robert Pearson ("Pearson")

No facts were disputed by any of defendants, nor by respondents B.O.R.N., Lee, Foreman, McMonagle, White,

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[2] Two additional individuals, Dan Brusstar and John Hinshaw, were named in the Order to Show Cause as respondents, but were not included in plaintiffs' proof of service, filed July 13, 1989, and plaintiffs no longer argue that these individuals are subject to the instant contempt proceeding.

Christopher Slattery ("Slattery"), another individual originally named in the Order to Show Cause, was later served with a subsequent Order to Show Cause to hold him in civil contempt. Slattery has disputed certain facts concerning his alleged violation of the Court's orders, and this matter is currently pending before the Court.

LaPenna and Talluto.[3] Respondents B. Nathanson, A. Nathanson and Pearson, disputed the alleged facts concerning their knowledge of the Court's orders and their involvement in blocking access to clinics in concert with defendants. The Court commenced a hearing regarding the disputed facts on August 9, 1989. On August 9, 10, 15 and 16, 1989, the Court heard testimony and received evidence concerning the alleged roles these three respondents played in blocking access to clinics in concert with defendants and in violation of the Court's orders.

The Court will first discuss the appropriateness of imposing contempt sanctions against defendants and the objections they raise to these contempt proceedings. Second, the Court will examine the appropriateness of imposing sanctions against the various respondents. Third, the Court will consider the plaintiffs' request for attorneys' fees and costs associated with this application. Finally, the Court will address the motions for sanctions against attorneys Washburn and Hale.

[397] DISCUSSION

The Court of Appeals, in its decision in this case, clearly outlined the applicable law governing civil contempt proceedings.

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[3] Ordinarily a hearing is required before a court may award civil contempt sanctions. Where there are no material facts in dispute, however, no hearing is necessary. *United States v. City of Yonkers*, 856 F.2d 444, 453 (2d Cir. 1988) (need for plaintiffs to present evidence establishing defendants' contempt was obviated by undisputed representation that defendants had violated court's order); *Parker Pen Co. v. Greenglass*, 206 F.Supp. 796, 797 (S.D.N.Y. 1962); 11 C. Wright & A. Miller, *Federal Practice and Procedure, Civil* § 2960, at 590 (1973).

> A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply.

886 F.2d at 1351; *E.E.O.C. v. Local 638, Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1178 (2d Cir. 1985) *aff'd*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). It is not necessary to show that the party disobeyed the court's order willfully. *E.E.O.C. v. Local 638, Local 28 of the Sheet Metal Workers' Int'l Ass'n, supra*, 753 F.2d at 1178.

A. *Defendants*

The Court of Appeals, in upholding this Court's determination that Operation Rescue and Terry had violated the May 4 Order, rejected defendants' contention that the order was impermissibly vague.

> The [May 4 Order] was sufficiently clear as to what acts were proscribed. It prohibited trespass and obstruction that had the effect of blocking "ingress to and egress from any facility at which abortions are performed" within a specific geographic area. It barred physical abuse and tortious harassment of patients and employees. These prohibitions were balanced by language expressly permitting sidewalk counseling in a reasonably quiet and nonthreatening manner. [citation omitted] The conduct that lay between that which was prohibited and that which was

> permitted was sufficiently clear for defendants to ascertain precisely what they could and could not do. Therefore, the order was specific enough to serve as the foundation for a contempt citation.

886 F.2d at 1352.

The language of the October 27 Order and the Permanent Injunction pertaining to defendants' proscribed and permitted conduct was essentially unaltered from the language of the May 4 Order. Accordingly, these orders are sufficiently clear and unambiguous to satisfy the first prerequisite for a contempt citation against defendants.

Defendants challenge the propriety of conducting these contempt proceedings on three grounds. First, they assert that the Court lacks jurisdiction to enforce its orders because these order were pending on appeal at the time the contempt proceedings were commenced. To the extent that defendants maintain this argument after the Court of Appeals decision, it is meritless.

Plaintiffs' instant application for contempt does not require the Court to reconsider, reexamine, or alter any of its prior orders, as this application has never before been presented to the Court. Defendants sought and were denied several stays pending appeal. Having failed to obtain a stay, defendants cannot now argue that the Court is without power to enforce its own orders until the Court of Appeals has addressed their validity. *See National Service Industries, Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982) (argument that plaintiff may not execute upon judgment because case was on appeal, where defendants did not obtain a stay pending appeal, bordered on the frivolous).

Second, defendants reassert their previously rejected argument that plaintiffs' motion for contempt is criminal, not civil, in nature because they allege it seeks to punish them for past conduct. This argument, resoundly repudiated by the Court of Appeals when put forth regarding the prior contempt proceedings against Operation Rescue and Terry, *see* 886 F.2d at 1351, is equally unavailing in these proceedings.

The demarcation between civil and criminal contempt is well-established. A sanction imposed to compel obedience to a lawful order of the court or to provide compensation to a complaining party is civil; a sanction imposed to punish for an offense against the public and to vindicate the authority of the court - not to provide private [398] benefits or relief - is criminal in nature. *Id.*

In each instance in which defendants are charged with knowing violation of the Court's orders, the particular order, including the coercive sanctions embodied within it, was issued prior to the alleged violative conduct. The May 4 Order, the October 27 Order and the Permanent Injunction forewarned defendants of the consequences of their actions should they choose to defy the Court's authority and block access to facilities which perform abortions in the New York City area. The ability to avoid the consequences of a violation of these orders was completely within the control of defendants, who had ample opportunity to comply with their prohibitions.[4] The prospectively fixed penalties in each case were entirely conditional and coercive, plainly intended to coerce compliance with the Court's orders and to preserve the parties' then-existing rights. Therefore, the Court concludes that defendants activities on May 6, 1988, October 29, 1988, and January 13 & 14, 1989, are subject to civil contempt sanctions imposed by the Court in its May 4 Order, October 27 Order, and Permanent Injunction, respectively.

Defendants' final argument is that the Court should recuse itself pursuant to 28 U.S.C. § 455(b)(1) because, by chance, it observed part of the January 14, 1989 demonstration at the Margaret Sanger Clinic. Defendants argue that this observation raises the appearance of partiality by the Court.

Section 455(b)(1) provides that a judge "shall disqualify himself ... [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

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[4] As the Court of Appeals explained in upholding the prior contempt finding against Operation Rescue and Terry:

> Faced on May 5, 1988 with a choice between compliance or noncompliance with the district Court's order, defendants chose the latter course.
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> The factual determination of noncompliance - the assessment of whether the standards showing contempt were satisfied - and the resulting imposition of fines necessarily occurred after the defendants' ample opportunity to comply had come and gone. Thus, since the sanctions were imposed to compel obedience to a court order they are civil in nature.

886 F.2d at 1351.

The Court informed all parties, on the record, of its limited observations of this demonstration, made while the Court was coincidentally attending to private matters in the vicinity. *See* Transcript of Hearing, conducted June 9, 1989, at 6-9. The Court's observations did not include the identification of any specific group or individual among the demonstrators. *Id.* Because the fact that a demonstration occurred outside the Margaret Sanger Clinic on January 14, 1989 is not disputed by either defendants or respondents, there is simply no basis upon which to justify refusal under section 455(b)(1).

The objections raised by defendants with respect to the Court's ability to render a decision on the civil contempt application are rejected. The Court now turns to the undisputed facts to determine whether civil contempt sanctions shall be imposed.

Plaintiffs assert that Operation Rescue and Terry are each liable for $100,000.00 due to violations of the Court's October 27 Order and Permanent Injunction. This amount is derived as follows: (1) $25,000 for the demonstrations in violation of the October 27 Order at Deer Park and Dobbs Ferry, New York, on October 29, 1988; (2) $25,000 for the demonstration in violation of the Permanent Injunction at the Margaret Sanger Clinic on January 13, 1989, and (3) $50,000 for the demonstrations in violation of the Permanent Injunction at six New York City area clinics on January 14, 1989. Plaintiffs also assert that Herlihy is liable for $25,000 due to his participation in the demonstration in violation of the May 4 Order at 154 East 85th Street, Manhattan, on May 6, 1988.

1. Operation Rescue and Terry

The undisputed facts presented by plaintiffs indicate that all of the demonstrations [300] at issue in these contempt proceedings were initiated and coordinated by Operation Rescue. Operation Rescue literature and Terry called for a National Day of Rescue on October 29, 1988, and reported both the Dobbs Ferry and Deer Park demonstrations as part of the National Day of Rescue. Exhibits A & B, annexed to Gundrum Aff.; Exhibit 37 annexed, to Gundrum Decl. Both Operation Rescue literature and Terry invited supporters to participate in the January demonstrations in New York City, and Operation Rescue literature subsequently claimed responsibility for these demonstrations. On January 12, 1989, two days after the issuance of the Permanent Injunction, a transcript of a television news show captured Terry talking with reporters regarding the next day's planned demonstration. Exhibit 23, annexed to Gundrum Decl. Terry coordinated and directed the demonstrators at the January 13, 1989 blockade, and instructed demonstrators to refuse to cooperate with the police. Exhibits 18, 20, 21, 19, 17 & 26, annexed to Gundrum Decl. On January 14, 1989, Terry once again led demonstrators to block access to the Margaret Sanger Clinic. Exhibit 21, annexed to Gundrum Decl. As the Court explained in its October 27 Order, Terry, as leader and organizer of Operation Rescue, is liable for civil contempt sanctions by virtue of his failure to alter his instructions to Operation Rescue participants that their goal was to block access to abortion facilities. As leader of the organization and of the particular activities that were enjoined, Terry had an affirmative duty to attempt to secure compliance by his rank and file. 697 F.Supp. at 1331. This duty was ignored by his purposeful conduct designed to violate the Court's orders and to encourage others to do so as well. *See* Exhibit A, annexed to Gundrum Aff. It is clear that Terry and Operation Rescue were not reasonably diligent in attempting to achieve compliance with the Court's orders. Indeed, the evidence demonstrates that Operation Rescue and Terry were diligent only in acting in direct contravention of these orders.

The undisputed facts are more than sufficient to satisfy plaintiffs' burden of proving by clear and convincing evidence that Operation Rescue and Terry violated the October 27 Order and the Permanent Injunction. Accordingly, Operation Rescue and Terry are each adjudged in civil contempt of the October 27 Order and the Permanent Injunction and are assessed coercive civil penalties, jointly and severally, in the amount of $100,000.

2. Herlihy

The undisputed facts establish that Herlihy participated in the May 6, 1988 demonstration and was arrested for blocking access to the physician's office, after rejecting the opportunity afforded by police to leave the area and comply with the May 4 Order. Plaintiffs assert Herlihy was personally served with the May 4 Order during the demonstration. Personal service of an order upon a party to an action, however, is not required. Parties are charged with a duty to monitor the progress of their cases and to ascertain the terms of any order entered against them. *Dole Fresh Fruit Co. v. United Banana, Inc.*, 821 F.2d 106, 109 (2d Cir. 1987); *Perfect Fit Inds., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808-09 (2d Cir. 1981). In addition, the May 4 Order was read by police to the demonstrators before police began making arrests. The evidence clearly and convincingly establishes that Herlihy knowingly violated the May 4 Order. Therefore, Herlihy is liable for coercive civil contempt sanctions in the amount of $25,000.

B. *Respondents*

Rule 65(d), Fed.R.Civ.P. provides an injunctive order of the court "is binding only upon the parties to the action; their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Rule 65(d) prevents defendants from carrying out prohibited activity through others who have actual notice of the court's orders. *Regal Knitwear v. N.L.R.B.*, 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945). Thus, civil contempt sanctions may be assessed [400] against nonparties who had actual notice of the orders in effect at the time in question and participated with defendants in violating those orders.

Respondents repeat the objections raised by defendants - that this Court lacks jurisdiction to preside over these contempt proceedings and that the imposition of sanctions against them for knowing violation of the Court's orders would be tantamount to criminal, not civil, contempt. Both arguments are rejected for the reasons stated in the previous section.[5]

Respondents also attack the validity of the underlying orders in this action by arguing that the Court's conclusion that plaintiffs presented a claim under 42 U.S.C. § 1985(3) was in error. This argument was rejected by this Court and Court of

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[5] If respondents had notice of the Court's orders, they stood in the same position as defendants with respect to their ability to avoid civil contempt sanctions by simply not violating these orders while acting in concert with defendants. The prospective sanctions in the orders were coercive and conditional as applied to respondents with actual notice, designed to secure future compliance. Thus, they are civil contempt fines. *See* 886 F.2d at 1351. Respondents' brash assertion that they should be allowed to act in concert with defendants in order to intentionally violate a court order which they had actual notice, while retaining impunity from the imposition of coercive sanctions fashioned to assure compliance with the order, is as groundless as it is insolent. Their repeated attempts to characterize this proceeding as one for criminal contempt conveniently ignore the numerous opportunities those respondents with actual notice of the orders had to comply with them, and thereby avoid any civil contempt penalties.

Appeals when raised by defendants, and is similarly without substance when voiced by respondents. *See* 886 F.2d at 1357-61, 704 F.Supp. at 1260. Therefore, even if respondents were in a position to challenge the validity of the underlying orders during a contempt proceeding against them, their challenge poses no impediment to imposing sanctions, if sanctions are warranted by their conduct. *See Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 60 (2d Cir. 1984) (contemnors may not attack validity of underlying orders during contempt proceedings against them.).

Respondents offer a number of challenges to service of the Order to Show Cause for entry of summary judgment holding them in contempt. Personal service was effectuated upon respondents B.O.R.N., Lee, Foreman, White and B. Nathanson; "leave and mail" service was effectuated upon respondents McMonagle and Pearson, using the form of mail directed by the Court in the Order to Show Cause; and service was effectuated by Federal Express mailing as authorized by the Court in the Order to Show Cause upon respondents LaPenna, Talluto, and A. Nathanson. *See* Proof of Service of Order to Show Cause, filed June 13, 1989.

Respondents LaPenna and Talluto challenge this Court's provision in the Order to Show Cause that, if "plaintiffs are unable to effect personal service after two attempts, they may serve respondents at their last known address by Federal Express." This provision was perfectly proper.[6]

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[6] A. Nathanson offered no challenge to the manner of service of the Order to Show Cause, filed opposition to the motion for contempt, and took part in the evidentiary hearing concerning her alleged violation of the Court's orders. Thus, she waived any objection to the service of the Order to Show Cause. *See* Rule 12(b)(5), Fed.R.Civ.P.; *Merz v. Hemmerle*, 90 F.R.D. 566, 568 (E.D.N.Y. 1981) (citing cases).

Rule 4(c)(2)(C)(i), Fed.R.Civ.P., allows service upon individuals "pursuant to the law of the state in which the district court is held...." *See Leab v. Streit*, 584 F.Supp. 748, 758-61 (S.D.N.Y. 1984). In New York State, service is permitted to be effected "in such manner as the court, upon motion without notice directs, if service is impracticable under paragraphs one [personal service], two [leave and mail service] and four [nail and mail service] of this section." New York State Civil Practice Law and Rules ("C.P.L.R.") § 308(5).

C.P.L.R. § 308(5) requires a showing of impracticability of other means of service, but does not require proof of due diligence or of actual prior attempts to serve a party under each and every method provided in the statute. *See Tremont Federal Savings* [401] *and Loan Assoc. v. Ndanusa*, 144 A.D.2d 660, 661, 535 N.Y.S.2d 8, 9 (2d Dep't 1988); *Saulo v. Noumi*, 119 A.D.2d 657, 658, 501 N.Y.S.2d 95, 97 (2d Dep't 1986); *Liebeskind v. Liebeskind*, 86 A.D.2d 207, 210, 449 N.Y.S.2d 226, 229 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 858, 460 N.Y.S.2d 526, 447 N.E.2d 74 (1983). The meaning of "impracticability" is not capable of easy definition, and will depend upon the facts and circumstances of the particular case. *Markoff v. South Nassau Community Hospital*, 91 A.D.2d 1064, 1065, 458 N.Y.S.2d 672, 673 (2d Dep't 1983) (single attempt at service without any supporting documentation that service might be impracticable was insufficient to sustain service under section 308(5)). *See also Hitchcock v. Pyramid Centers of Empire State Co.*, 151 A.D.2d 837, 542 N.Y.S.2d 813 (3d Dep't 1989) (same).

In this case, plaintiffs were faced with the task of serving numerous nonparty respondents with an Order to Show Cause for a proceeding seeking to hold them in contempt and impose sanctions upon them. Evidence was presented by plaintiffs of the practical difficulties they would encounter in effectuating such service because of respondents' demonstrated disregard for the authority of the Court, as illustrated by *inter alia*, (1) prior contempt findings by other courts against many of respondents when similar orders enjoining the blocking of access to clinics were intentionally violated, (2) the statements of certain respondents, including Talluto, that they would not honor the Court's orders or pay any penalty for violating laws in relation to their actions in blocking access to clinics, and (3) their actions in blocking access to clinics after the Court's orders had been read. *See* Exhibits 8, 9, 10, 13, 15, 37 & 34, annexed to Gundrum Decl.

The problems encountered with service of an order to show cause for contempt on nonparties have been specifically noted by the courts in New York. As the First Department explained:

> [i]n the particular context of contempts not committed in the immediate presence of the courts, it is frequently the case that those who have flagrantly violated the court's orders are not disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders.

Dep't of Housing Preservation and Development v. 24 West 132 Equities, Inc., 137 Misc.2d 459, 462, 524 N.Y.S.2d 324, 327, (1987) *aff'd without opinion*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1989). The court suggested that the manner of service is sufficient if it is "reasonably calculated under all the circumstances to apprise respondents of the pendency of the action." *Id.* *See also Saulo v. Noumi*, *supra*, 119 A.D.2d at 658, 501 N.Y.S.2d at 97.

The manner of service authorized in the Order to Show Cause was reasonably calculated to apprise respondents of the pendency of the action, and required plaintiffs to endeavor to make at least two attempts at personal service prior to resorting to the Court sanctioned method of service, thus satisfying the impracticability requirement of section 308(5). *See Dashew v. Cantor*, 85 A.D.2d 619, 620, 445 N.Y.S.2d 24, 25 (2d Dep't 1981) (service under 308(5) authorized when defendant likely to attempt to evade service); *Tremont Federal Savings and Loan Assoc. v. Ndanusa*, *supra*, 144 A.D.2d at 661, 535 N.Y.S.2d at 9.[7]

[402] Next, respondents White and McMonagle challenge the validity of extraterritorial service upon them under Rule 4(f), Fed.R.Civ.P. This argument is confused and misguided. Rule

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[7] Even if the Court were to find that the method of substitute service was not authorized by state law, there would be no need to dismiss the contempt proceedings against these respondents because they have shown absolutely no prejudice from the manner of actual service. Instead, service on La Penna and Talluto would be quashed, and plaintiffs would be directed to serve these respondents anew in one of the other manners set forth in section 308. *See* C. Wright & A. Miller, *Federal Practice and Procedure: Civil § 1354 (1969)*. As respondents have supported their argument by asserting that they are amenable to service, such a course of action would only unjustly delay these contempt proceedings where there is no serious contention that service did not do what it was intended to do, namely, give respondents notice of the pendency of the proceeding. *Cf. Feuntes v. Buser-American, Inc.*, No. 80 Civ. 4965, slip op. (S.D.N.Y. April 8, 1983); *Jones v. Building and Property Rehabilitation*, No. 81 Civ. 950, slip op. (N.D.N.Y. June 25, 1982); *Berhalter v. Irmisch*, 75 F.R.D. 539, 540 (W.D.N.Y. 1977).

4(f) provides for service "within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state." Rule 4(e), Fed.R.Civ.P., provides authority for extraterritorial limits of that state." Rule 4(e), Fed.R.Civ.P., provides authority for extraterritorial service in accordance with the law of the state in which the district court sits in the manner prescribed by state law. *Davis v. Musler*, 713 F.2d 907, 914 (2d Cir. 1983). *See Waffenschmidt v. Mackay*, 763 F.2d 711, 720 (5th Cir. 1985) (court has inherent power to enforce injunctive decrees lest court orders may be flouted, obstructed and violated with impunity, and Rule 4(f) does not bar extra-territorial service of an order to show cause for contempt), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 794, 88 L.Ed.2d 771 (1986). Therefore, under the rubric provided by Rules 4(f) and 4(e), the Court must look to New York law to evaluate the adequacy of service on these respondents.

White and McMonagle do not dispute that they participated in demonstrating in New York, and the Court may exercise jurisdiction over them to determine whether they purposefully violated the Court's orders in concert with defendants. *See Waffenschmidt v. Mackay, supra*, 763 F.2d at 718-19; *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963). New York State Judiciary law § 761 provides for service of an application for civil contempt, and nonresidents over whom the Court has jurisdiction may be served in accordance with the provisions of C.P.L.R. § 308. Plaintiffs complied with the requirements of section 308 by personally serving White and utilizing leave and mail service upon McMonagle.[8] This challenge to service of the Order to Show Cause is baseless.

Finally, respondents McMonagle, White, LaPenna and Talluto challenge the sufficiency of service of the Order to Show Cause pursuant to Rule 4(j) and 10(b), Fed.R.Civ.P.[9] They argue that they should be considered named defendants in this action because plaintiffs used fictitious names in the complaint to stand for defendants whose identities were unknown. As defendants, this argument continues, they are not bound by the orders of this Court since they were not served with the complaint in the underlying action within 120 days after the case was removed, or the amended complaint was filed. While this argument may be appealing to respondents, from whose vantage point it appears as a safe harbor into which they can sail for protection from their violations of this Court's order, it flies in the face of the law and common sense and must be rejected.

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[8] The fact that the Order to Show Cause was mailed via Federal Express, as opposed to conventional mail, in no way undermines plaintiffs' compliance with the requirements of C.P.L.R. §308.

[9] Rule 4(j) provides, in pertinent part, that:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon ... motion.

Rule 10 provides, in part, that "[i]n the complaint the title of the action shall include the names of all the parties...."

Respondents were nonparties to the underlying action who allegedly acted in concert with defendants in violation of the Court's injunctive orders. Respondents were never named as parties to the underlying action, and are not now parties to that action.[10] The Court can conceive of no basis for equating the anonymous parties listed in the complaint with nonparties who are later alleged to have violated the Court's orders, with notice of these orders, in active concert with defendants. Respondents have offered none. Indeed, it cannot be seriously argued that the Court loses its power to enforce its valid injunctive orders [403] against nonparties acting in concert with defendants simply because more than 120 days pass from the time the complaint in the underlying action was filed. Nor can it be maintained that Rule 4(j) converts every possible contemnor into an indispensable party under Rule 19, Fed.R.Civ.P., who must be joined prior to adjudicating the controversy. Finally, it is absurd to suggest that plaintiffs are forced to do the impossible; foretell which individuals will subsequently act in concert with defendants in violation of an injunctive order of the Court and serve them within 120 days of filing the complaint. Accordingly, Rule 4(j) is completely inapplicable to these respondents.

Respondents have offered no competent evidence disputing actual service of the Order to Show Cause, despite several admonitions from the Court to do so if they wished to continue to challenge the sufficiency of service. No factual affidavits were submitted by respondents. Respondents have not contested that they received actual notice of these proceedings and were afforded the opportunity to defend themselves from the claims asserted against them. Therefore, the challenges to the service of the Order to Show Cause are denied. The Court now turns to examine the specific orders as they relate to respondents, and the actions of the various respondents in concert with defendants.

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[10] Plaintiffs' use of fictional names in the complaint to denote unknown potential defendants was perfectly proper under the New York law. *Lowenstein v. Rooney*, 401 F.Supp. 952, 960 (E.D.N.Y. 1975).

1. The Language of the Orders Relating to Respondents

Plaintiffs assert that respondents Lee, Foreman, LaPenna, Pearson and A. Nathanson are each liable for $25,000 in civil contempt fines due to their blocking access to the physician's office at 154 East 85th Street in Manhattan on May 6, 1988, in concert with defendants and in violation of the May 4 Order.

The wording of the May 4 Order, however, while specifically warning defendants that they would be liable for sanctions in the amount of $25,000 in the event they violated the order, did not clearly extend this sanction to those acting in concert with them. The May 4 Order read, in pertinent part, that:

> defendants' failure to comply with this Order, shall subject them to civil damages of $25,000 per day for any violations of this Order.

The May 4 Order expressly included "all other persons whomever acting in concert with [defendants] with notice of [the] order' in its prohibition on blocking access to clinics. The express inclusion of those acting in concert with defendants was not carried over in providing that coercive sanctions were deemed appropriate as a means of securing compliance with the order. A reasonable reading of the May 4 Order, therefore, might lead to the conclusion that those acting in concert with defendants were not subject to the $25,000 sanction. The Court does not believe that the May 4 Order was sufficiently clear to give respondents adequate notice that they, as opposed to defendants, would be exposed to the $25,000 coercive penalty.

Accordingly, no fines will be assessed against respondents for their involvement in the May 6 demonstration.[11]

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[11] The unchallenged evidence demonstrates that respondents Lee, Foreman and La Penna acted in concert with defendants in violation of the May 4 Order, with actual notice of the order.

Lee was personally served with a copy of the May 4 Order by police while leading and directing the demonstration and wearing an armband with the inscription "O.R." Third Statement of Stipulated Facts, *supra*, ¶ 7. He was subsequently arrested for blocking access to the facility. *Id.*; Exhibit 36, annexed to Gundrum Decl. Foreman is the Southeast Regional Director of Operation Rescue. Foreman and La Penna participated in the Operation Rescue demonstrations on May 2, 3 and 6, and were arrested on each day. Exhibit 36, annexed to Gundrum Decl. The May 4 Order was read by police to demonstrators on May 6, 1988, and Terry informed the demonstrators of the terms of the May 4 Order. The police offered the demonstrators the opportunity to leave the area and comply with the order after reading the injunction and prior to beginning arrests. Third Statement of Stipulated Facts, *supra*, ¶ 7. This evidence is sufficient to establish that Lee, Foreman and La Penna had notice of the May 4 Order, had the opportunity to avoid violating that order, yet nonetheless acted in concert with defendants to intentionally defy that order. Accordingly, Lee, Foreman and La Penna are adjudged in civil contempt of the May 4 Order.

Both A. Nathanson and Pearson admit being part of the demonstration that blocked access to the office on May 6, 1988 and to being arrested for their activities. They both dispute, however, receiving notice of the May 4 Order. A Nathanson testified that she arrived late and did not hear the police officer or Terry read the May 4 Order to those blocking access to the clinic. Transcript of Argument and Evidentiary Hearing held on July 28, August 9, 10, 15 & 16, 1989 ("Tr."), at 555-557. Similarly, Pearson testified that he arrived late, after the police had read the injunction, but just in time to be arrested for blocking access to the office. Tr. 411, 532-33. The stories told by both respondents in disavowing notice of the May 4 Order were, at best, far-fetched. The disorder associated with arresting the hundreds of demonstrators that day, however, militates

(continued...)

[404] The October 27 Order and the Permanent Injunction remedied the ambiguity in the May 4 Order by explicitly providing that those individuals or organizations operating in concert with defendants with notice of the order would also be liable for coercive sanctions in the amount of $25,000 per day for any violations. For example, the October 27 Order provided that:

> defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue participants") are:
>
> 1) enjoined and restrained.... ... and it is further
>
> ORDERED that the failure to comply with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this Order shall subject them to civil damages of $25,000 per day for any violations of this Order.

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[11](...continued)

against finding their testimony so incredible as to be unbelievable given that plaintiffs were unable to produce any evidence directly placing either respondents at the demonstration while the injunction was read. Plaintiffs did not meet their burden of establishing that these respondents had notice of the May 4 Order. Accordingly, A. Nathanson and Pearson are not adjudged in civil contempt for their participation in the May 6, 1988 demonstration.

Similarly, the Permanent Injunction defined Operation Rescue participants in the same manner as the October 27 Order, and provided that:

> the failure to comply with this order by any Operation Rescue participant with actual notice of the provisions of this Order shall subject him or her to civil damages of $25,000 per day for the first violation of this Order, and it is further
>
> ORDERED that each successive violation of this Order shall subject the contemnor to civil contempt fine double that of the previous order.

Both provisions more than adequately warn those acting in concert with defendants that they will be subject to civil penalties of $25,000 per day for violations of these orders.[12]

Certain respondents next attack the language of the October 27 Order and the Permanent Injunction, arguing that, because all defendants were not specifically listed in the captions of these orders, the orders did not afford respondents sufficient notice as to when their actions in concert with others would expose them to the threat of civil contempt sanctions.[13] This argument is disingenuous. The caption of the October 27 Order includes Terry, Operation Rescue, and Herlihy as named defendants; the caption of the Permanent Injunction lists Terry. There are numerous references throughout both orders to Operation Rescue and Operation Rescue participants, and it is undisputed that Operation Rescue coordinated and conducted [405] the various demonstrations at issue in these contempt proceedings. The terms of the orders with respect to nonparties acting in concert with defendants are more than sufficiently clear, at least with respect to acting in concert with Terry and Operation Rescue, to give a person of ordinary intelligence fair notice of what conduct is being proscribed. *See* 886 F.2d at 1352; *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985). Thus, the orders fully satisfied the specificity requirements of Rule 65(d). *See* 886 F.2d at 1351-52.

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[12] Likewise, the Permanent Injunction adequately apprises respondents of the consequences of successive violations of the Order.

The Court will now examine respondents' conduct as it relates to the October 27 Order and the Permanent Injunction.

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[13] Additionally, respondents challenged the reasonableness of the $25,000 sanction. Both this Court and the Court of Appeals considered the amount of the coercive fines listed in the Court's orders and concluded that they were reasonable in relation the facts and circumstances of this case. *See* 886 F.2d at 1353; 704 F.Supp. at 1263-64; 697 F.Supp. 1332-34. Indeed, the persistent conduct of certain contemnors in continually violating the orders implies that the coercive sanctions may not be stringent enough to protect plaintiffs' rights. Neither defendants nor respondents provided the Court with any financial information upon which the burden of imposing the sanction on them might be evaluated, and this failure may not be charged against plaintiffs in determining the reasonableness of the fine. *See* 886 F.2d at 1353.

2. B.O.R.N.

Plaintiffs assert that B.O.R.N. is liable for $25,000 due to its involvement with the sponsorship of the demonstrations in Deer Park and Dobbs Ferry, New York on October 29, 1988, in violation of the October 27 Order. B.O.R.N. is a local group affiliated with Operation Rescue. Six of its leaders, including respondents Lee and LaPenna, signed a letter on B.O.R.N. letterhead calling on its members to participate in the "National Day of Rescue" called by Operation Rescue in October 1988. Exhibit G, annexed to Gundrum Aff.; Exhibit 37, annexed to Gundrum Decl. A rally, announced by a B.O.R.N. newsletter, was held on October 27, 1988, at which time Lee criticized the Court's preliminary injunction. Ex 19, annexed to Gundrum Decl. Lee led the demonstration in Dobbs Ferry, and LaPenna was arrested at the demonstration in Deer Park. Exhibits 19 & 14, annexed to Gundrum Decl. Plaintiffs have demonstrated with clear and convincing proof that B.O.R.N. had knowledge of the October 27 Order and acted in concert with defendants to violate that order. Accordingly, B.O.R.N. is adjudged in civil contempt of the October 27 Order and is assessed coercive civil penalties in the amount of $25,000.

3. Lee

Plaintiffs assert that Lee is liable for $100,000 do to his active involvement with defendants in violating the Court's October 27 Order and the Permanent Injunction. This amount is computed as follows: (1) $25,000 for the demonstration in violation of the October 27 Order at Dobbs Ferry, New York on October 29, 1988, (2) $25,000 for the demonstration in violation of the Permanent Injunction at the Margaret Sanger Clinic on January 13, 1989, and (3) $50,000 for the demonstration in violation of the Permanent Injunction at the VIP Medical

Associates Clinic in Manhattan (the "VIP Clinic") on January 14, 1989.

Lee, a leader of B.O.R.N., discussed the October 27 Order at a rally on October 1988, prior to leading the demonstration in Dobbs Ferry on October 29 which blocked access to the Women's Pavilion medical clinic as part of Operation Rescue's "National Day of Rescue". Exhibits 19, 18 & 37, annexed to Gundrum Decl.

Lee was personally served with a copy of the Permanent Injunction on or about January 12, 1989, at a meeting between police and Operation Rescue leaders. Exhibit 27, annexed to Gundrum Decl. Lee participated in the demonstration on January 13, 1989 which blocked access to the Margaret Sanger Clinic, during which time he described himself as an Operation Rescue leader, authorized to speak for the group, and stated that their purpose was "to block the doors so they cannot do abortions today." Exhibit 17, annexed to Gundrum Decl.

On January 14, 1989, Lee participated in the demonstration which blocked access to the VIP Clinic. Lee wore an armband with the inscription "O.R." and directed demonstrators in blocking the clinic door. Exhibit 18, annexed to Gundrum Decl. Lee used a bullhorn to lead songs when a police officer began to read the Permanent Injunction to the demonstrators. *Id.* After refusing to move, Lee was arrested. These undisputed facts definitively supply the requisite clear and convincing proof that Lee acted in concert with defendants in violating the Court's orders and blocking access to clinics, with knowledge of the October 27 Order and the Permanent Injunction. Consequently, Lee is adjudged in **[406]** civil contempt of the October 27 Order and the Permanent Injunction and is assessed coercive civil penalties in the amount of $100,000.

4. Foreman, McMonagle and White

Plaintiffs assert that Foreman, McMonagle and White are each liable for $25,000 due to their active involvement with defendants in violating the Permanent Injunction by participating in the demonstration at the Margaret Sanger Clinic on January 13, 1989. Both Foreman and McMonagle received notice of the Permanent Injunction by being served a copy of the order at a meeting on or about January 12, 1989, between the police and Operation Rescue leaders. Exhibit 27, annexed to Gundrum Decl. Foreman, McMonagle and White all participated in the January 13, 1989 demonstration that blocked access to the Margaret Sanger Clinic. McMonagle wore an armband with the inscription "O.R." and gave demonstrators instructions before and while they were being arrested. Exhibit 17, annexed to Gundrum Decl. White was present when the Permanent Injunction was read by the police, instructed demonstrators in blocking access to the clinic, and was arrested for his participation in the demonstration. Statement of Material Facts Not in Dispute, filed June 9, 1989.

The evidence clearly demonstrates that Foreman, McMonagle and White had notice of the Permanent Injunction yet, nonetheless, acted in concert with defendants to intentionally violate the Court's decree. Therefore, Foreman, McMonagle and White are each adjudged in civil contempt of the Permanent Injunction and are each assessed coercive civil penalties in the amount of $25,000.

5. Talluto and LaPenna

Plaintiffs assert that Talluto is liable for $50,000 for her active involvement with defendants in violating the October 27 Order and the Permanent Injunction: $25,000 for her participation in the demonstration at the Women's Pavilion clinic in Deer Park, New York on October 29, 1988 and $25,000 for her participation in the demonstration at the VIP Clinic in Manhattan on January 14, 1989.

Plaintiffs assert that LaPenna is liable for $25,000 for his active involvement with defendants in violating the October 27 Order by blocking access to the Women's Pavilion clinic in Deer Park, New York on October 29, 1988. LaPenna was one of the six leaders of B.O.R.N. who signed the letter calling on individuals to participate in the "National Day of Rescue" called by Operation Rescue for October 1988.

The October 27 Order was read to persons blocking access to the clinic from across the street by a number of counter demonstrators, before police began arresting the demonstrators. Exhibit 37, Annexed to Gundrum Decl. Both Talluto and LaPenna were arrested for blocking access to he clinic. Exhibits 15 and 39, annexed to Gundrum Decl.

On January 14, 1989, Talluto participated in a demonstration sponsored by Operation Rescue which blocked access to the V.I.P. clinic in Manhattan. Inspector James Helbock read the Permanent Injunction to the demonstrators, before police began making arrests. Talluto was arrested that day for blocking access to the clinic.

The uncontroverted evidence is sufficient to establish that Talluto and LaPenna had notice of the October 27 Order and that Talluto had notice of the Permanent Injunction, yet both acted in concert with defendants to intentionally violate these orders. Accordingly, Talluto is adjudged in civil contempt and assessed coercive civil penalties in the amount of $50,000 and LaPenna is adjudged in civil contempt and assessed coercive civil penalties in the amount of $25,000.

6. B. Nathanson

Plaintiffs assert that B. Nathanson is liable for $25,000 for his active involvement with defendants in violating the Permanent Injunction by blocking access to the Margaret Sanger Clinic on January 13, 1989. B. Nathanson testified that he attended the Operation Rescue demonstration held at the Margaret Sanger Clinic on [407] January 13, 1989. Tr. 207-08. He was also present at an Operation Rescue rally the night before, where he was informed that Operation Rescue demonstrators would meet at an assembly point in midtown Manhattan, on the morning of January 13, 1989, and then proceed to an unspecified facility where abortions are performed. Tr. 204-06. B. Nathanson arrived at the designated assembly point and followed an Operation Rescue marshal to the site of what he knew to be an Operation Rescue demonstration in front of the clinic. Tr. 204-06, 208-09. He arrived at the demonstration between 7:00 and 7:30 a.m., Tr. 207, 584, and spent approximately three to four hours standing or sitting on the sidewalk near the front of the clinic. Tr. 201-03, 07.

Ellen Carton, an employee of the New York State affiliate of the National Abortion Rights Action League, testified that she served B. Nathanson with a copy of the permanent injunction as he sat in front of the clinic that morning. Tr. 511-12. There was conflicting testimony presented regarding where B. Nathanson stood or sat for most of his time at the demonstration, with some evidence that he remained in the area in front of the clinic until approximately 8:00 a.m. Tr. 202-03, 245-47, 452, 467, 586-89. B. Nathanson, however, maintained that he remained on the periphery of the demonstration for most of his time there, outside of the main group of demonstrators blocking access to the clinic. Tr. 220-223, 589. The Permanent Injunction was read over a bullhorn by police at approximately

8:00 a.m., prior to their commencing arrests of demonstrators blocking access to the clinic. B. Nathanson was not arrested.

While the Court believes that the evidence presented regarding B. Nathanson's activities on January 13 indicates that he received notice of the injunction and was well aware of the purpose of the demonstration and Operation Rescue's sponsorship of the demonstration, it does not clearly and convincingly show that he acting concert with defendants to violate the Permanent Injunction. The Court notes: (1) a lack of clear evidence placing B. Nathanson in the area in front of the clinic for any length of time after he was apparently served with the injunction or after the police read the injunction, (2) his stated denial that he remained in this area, and (3) the failure of his conduct to result in his arrest, when hundreds of other demonstrators blocking access to the clinic were arrested. These factors militate against finding that plaintiffs have carried their burden of proving, by clear and convincing evidence, that he violated the Court's order. Accordingly, B. Nathanson is not adjudged in civil contempt for his actions on January 13, 1989.

7. A. Nathanson

Plaintiffs assert that A. Nathanson is liable for $25,000 due to her active involvement with defendants in violating the October 27 Order by blocking access to the Women's Pavilion clinic in Dobbs Ferry on October 29, 1988. A. Nathanson testified that she sat on the steps in front of the clinic with the intention of blocking entrance and exit from the premises. Tr. 561, 267-68. In addition, she admitted that she was aware that on October 29, 1988, Operation Rescue had called for demonstrations across the country. Tr. 564-65. She testified that she was a "National Day of Rescue participant" and followed instructions from Operation Rescue marshals wearing Operation Rescue armbands. Tr. 263, 278, 430-31. Plaintiffs introduced a videotape of the demonstration which clearly shows that the entrance to the clinic was blocked by the demonstrators, and that A. Nathanson formed part of that blockade at various times during the demonstration. Hearing Exhibit 9 ("Ex 9").

A. Nathanson disputes receiving notice of the October 27 Order, but the evidence adduced at the hearing demonstrated that this assertion was not credible. Notice was given to the demonstrators in several ways that day. Kelli Conlin, the former president of the New York City chapter of N.O.W., testified that she read the October 27 Order through a bullhorn to the demonstrators at approximately 8:00 a.m. Tr. 432. At approximately 9:30 a.m., Lieutenant Perilli of the Dobbs Ferry police department, [408] while standing directly in front of the demonstrators, read the October 27 Order to them through a bullhorn. Ex. 9; Tr. 433-437. The demonstrators were quiet during both times that the injunction was read, Tr. 432-33; Ex. 9, and there was testimony that the words of the injunction were clearly audible from some distance away. Tr. 436-37, 443. The videotape of the demonstration clearly showed A. Nathanson blocking access to the clinic at approximately 9:10 a.m., after the first reading of the October 27 Order, at approximately 9:30 a.m., as Lt. Perilli finished reading the October 27 Order and at approximately 10:40 a.m., while counter-demonstrators could be heard chanting "enforce the injunction." Ex. 9.

A. Nathanson argues that she should not be found to have violated the October 27 Order because none of the demonstrators were arrested that day, and eventually they all left of their own volition. The lack of arrests, however, does not alter the fact that access to the clinic was blocked by Operation Rescue and National Day of Rescue participants, without permission, in violation of the October 27 Order. The evidence clearly and convincingly established that A. Nathanson acted in concert with defendants to block access to the clinic, received actual notice of the October 27 Order, yet did not cease her participation in the demonstration or refrain from blocking access to the clinic. Therefore, A. Nathanson is adjudged in civil contempt of the October 27 Order and assessed coercive civil penalties in the amount of $25,000.

8. Pearson

Plaintiffs assert that Pearson is liable for $25,000 due to his active involvement with defendants in violating the Permanent Injunction by blocking access to the VIP Clinic in Manhattan on January 14, 1989.[14] Pearson testified that he travelled from New Jersey on January 14, 1989, in order to participate in an Operation Rescue demonstration. Tr. 166, 535, 541. He arrived at the VIP Clinic before 8:00 a.m. on January 14, 1989. Tr. 164-65. A police videotape of the demonstration was introduced at the hearing, which shows that the Permanent Injunction was read to the crowd of demonstrators blocking access to the clinic by a police officer. Hearing Exhibit 1 ("Ex. 1") Pearson is clearly visible in the videotape, standing inside a police barricade, only a few feet away from the police officer who was standing on the other side of the barricade, as the officer read the Permanent Injunction with the aid of a bullhorn. *Id.* After the officer announced he was about to read the injunction, the demonstrators began singing. *Id.* Pearson testified that singing during the reading of court orders is standard procedure for demonstrators participating in "rescues" in which they block access to clinics performing abortions, and that he believed that was exactly what was happening on January 14, 1989. Tr. 538.

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[14] Pearson, in an untimely post-hearing submission, argues for the first time that plaintiffs failed to prove the VIP Clinic is a facility that offers abortions. This after-the fact assertion is groundless. The hearing was commenced to determine the disputed factual issues raised by respondents – whether they had actual notice of the Court's orders and acted in concert with defendants in violation of these orders. Plaintiffs asserted that the VIP Clinic is a facility that performs abortions in the Statement of Material Facts not in Dispute, filed June 9, 1989. Pearson decided not to challenge this assertion. Indeed, his testimony at the hearing readily implies that he believes abortions are offered at the VIP Clinic, thus prompting the "rescue" demonstration . Tr. 535, 541, 548. He cannot now argue that his failure to contest whether the VIP Clinic offered abortions supplies a means to avoid the consequences of his own actions.

Copies of the Permanent Injunction were distributed to demonstrators sitting or standing in front of the doors of the VIP clinic. Tr. 503. Another videotape was introduced by plaintiffs which shows a uniformed police officer handing a set of papers, identified as a copy of the permanent injunction, to Pearson as he stood inside the police barricades, blocking access to the clinic. Hearing Exhibit 5 ("Ex. 5"); Tr. 503, 408.

After the injunction was read, and after being served with a copy of the injunction, **[409]** Pearson nevertheless remained standing in front of the clinic with other Operation Rescue demonstrators, blocking access to the door, and at one point linking arms with other demonstrators to form a more effective human barricade. Ex. 5; *See* Tr. 390. The police arrested Pearson for his activities in blocking access to the clinic that day. Tr. 168.

The evidence presented to the Court was overwhelming that Pearson had notice of the Permanent Injunction, yet nonetheless acted in concert with defendants in violating the order by blocking ingress to and egress from the VIP Clinic on January 14, 1989. Pearson's protestations that he had no notice of the injunction are clearly belied by the videotapes and the other evidence submitted at the hearing, and are simply not credible.[15] Accordingly, Pearson is adjudged in civil contempt of the Permanent Injunction and assessed a coercive fine in the amount of $25,000.

C. *Attorneys' Fees and Costs*

Plaintiffs seek attorneys' fees and costs from each contemnor to compensate them for their expenditures in bringing on the motion for contempt. Civil contempt sanctions may serve either to coerce the contemnor into future compliance with a court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance. 886 F.2d at 1352. The $25,000 fines were coercive sanctions designed to ensure compliance with the Court's orders. In addition, the Permanent Injunction expressly warned "that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in enforcing this Order. "This additional penalty can likewise be viewed as a coercive fine designed to ensure compliance.

Moreover, where respondents have "responded with callous indifference to [their] obligations under the order," not only are coercive sanctions justified, but also costs and attorneys' fees. *N.A. Sales Co., Inc. v. Chapman Industries Corp.*, 736 F.2d 854, 858 (2d Cir.1984); *See also Hutto v. Finney,* 437 U.S. 678, 689 n. 14, 98 S.Ct. 2565, 2573 n. 14, 57 L.Ed.2d 522 (1978); Rule 43(a), Civil Rules of the United States Courts for the Southern and Eastern Districts of New York ("Civil Rules") ("A reasonable counsel fee, necessitated by the contempt proceedings, may be included as an item of damage.")

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[15] In any event, conscious disregard of notice of the Permanent Injunction will not suffice to provide immunity for actions then taken in direct violation of that order.

An award of attorneys' fees and costs serves the compensatory purpose of civil contempt and avoids penalizing the complainant who is protected by the order, for the actions of contemnors who purposefully violate that order. *See Local 28 of the Sheet Metal Workers' Int'l Assoc. v. E.E.O.C.*, 478 U.S. 421, 444 n.23, 106 S.Ct. 3019, 3033 n. 23, 92 L.Ed.2d 344 (1986); *Vuitton et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979) (if the violation of the court's order is willful, compensatory damages to the complainant should include reasonable costs for prosecuting the contempt, including attorneys' fees). The evidence more than adequately demonstrates the intentional violation of the three orders of this Court by the various defendant and respondent contemnors. Accordingly, each defendant and respondent who violated the May 4 Order, the October 27 Order and/or the Permanent Injunction is liable for the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her.

D. *The Rule 11 Motion Against Washburn*

On July 14, 1989, certain respondents, through attorney Washburn, filed a memorandum opposing the Order to Show Cause. The memorandum raised three arguments: (1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals and (3) improper service of the Order to Show Cause under Rules 4(c)(2)(C)(i) and (ii). On July 28, 1989, Washburn argued each of these points and [410] orally moved to dismiss the action against Talluto and LaPenna. The Court advised Washburn to submit a motion in proper form, with supporting affidavits, if he wished to move to dismiss or quash service on behalf of respondents. On August 4, 1989, Washburn filed a cross-motion to dismiss plaintiffs' motion for contempt on behalf of respondents Talluto, LaPenna, White and McMonagle. The cross-motion asserted dismissal was appropriate because (1) service of the Order to Show Cause was improper under various provisions of Rule 4, (2) respondents enjoyed a good faith immunity as national citizens under the Privileges and Immunities clause of the 14th Amendment and (3) respondents were not offered an opportunity to purge their contempt, thus making the proceeding one for criminal contempt.[16]

Also on that date, Lee and Foreman filed a similar cross-motion to dismiss the motion for contempt, incorporating, in substantial part, the arguments made in the motion by Talluto, LaPenna, White and McMonagle. The cross-motion by Lee and Foreman was denied in part in accordance with an oral decision rendered on August 9, 1989. At that time, the Court reserved decision on the portion of the cross-motion by Lee and Foreman which was based upon the related cross-motion to be argued by Washburn. The latter cross-motion was denied in all respects, form the reasons stated by the Court during oral argument on August 10, 1989. Tr. 319-21. This denial was without prejudice. The Court explained that the motion, as it was addressed to the issue of service, was inadequate in its present form, as there were no affidavits by any of the respondents concerning service. Tr. 300-02, 318-21. The Court cautioned Washburn and the respondents that "[i]n the event the motion is renewed and denied as frivolous, the Court would entertain a motion by plaintiffs for appropriate sanctions." Memorandum Endorsement, filed August 10, 1989. On August 16, 1989, the Court extended the period for renewal of the motion until August 30, 1989, in order to allow Washburn time to make a thorough investigation of his claims, once again noting the possibility of Rule 11 sanctions should such a renewed motion be frivolous. Tr. 604-06.

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[16] The substance of the arguments raised by Washburn, that service of the Order to Show Cause was improper and that the proceeding was one for criminal contempt, have been addressed and rejected by the Court in the preceding discussion. *See infra*, Sections A and B. The additional argument, that the Privileges and Immunities clause provides a shield for respondents who act in knowing violation of the Court's orders, was advanced by Washburn without relevant legal authority and is completely without foundation. In fact, the authorities that Washburn cites in his subsequent memorandum, ostensibly for support, directly contradict his argument. *See* Respondents' Memorandum dated August 30, 1989, filed September 15, 1989 at 7. Respondents have no Constitutional right to intentionally violate the orders of the Court.

On August 30, 1989, Washburn, on behalf of Talluto, LaPenna, White and McMonagle, filed a document requesting to renew the August 4 cross-motion. Subsequently, plaintiffs filed a motion for the imposition of Rule 11 sanctions against Washburn.

The document Washburn filed on August 30, 1989, titled "Respondents' Memorandum dated August 30, 1989" is signed by Washburn and purports to renew the earlier motion. No notice of motion was filed, nor were any supporting affidavits attached, despite the directive of the Court and the requirements of Civil Rule 3. No new arguments were advanced in the memorandum, with the exception of a section arguing that attorneys possess immunity from sanctions for their conduct in a judicial proceeding and, therefore, that Rule 11 sanctions cannot be imposed upon them.[17]

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[17] This new argument advances yet another baseless claim. Washburn urges that Rule 11, as amended in 1983, violates the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right." He asserts that Rule 11 abridges an attorney's common law substantive right to absolute immunity from sanctions that arise from actions taken in judicial proceedings.

Nowhere, however, has Washburn cited any authority for his proposition that attorneys enjoy common law immunity from sanctions for frivolous conduct before a court. Indeed, courts have had the equitable power to award costs and attorneys fees as sanctions for frivolous conduct prior to the enactment of Rule 11. *See Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973), *superseded by statute on other grounds*, Act of Jan. 2, 1975, Pub.L.No. 93-600, § 3,88 Stat.1955. *See also* Notes of the Advisory Committee on Rule 11. As the Supreme Court has explained:

> [t]he power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes.

Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980), *superseded by statute on other grounds*, Act of September 12, 1980, Pub.L. 96-349, § 3, 94 Stat 1156, 1156 (codified as amended at 28 U.S.C. § 1927).

Moreover, the Supreme Court has upheld Rule 38, Federal Rule of Appellate Procedure, which awards costs and damages to the appellee when a court of appeals determines that an appeal is frivolous, against a challenge that it conflicted with a state statute and thus abridged a substantive right in violation of the Rules Enabling Act, *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 8, 107 S.Ct. 967, 971, 94 L.Ed.2d 1 (1986). The Supreme Court stated that:

(continued...)

[411] 1. Standards for Imposing Rule 11 Sanctions

Rule 11 provides, in pertinent part, that: The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the

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[17](...continued)

> [t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidently affect litigants' substantive rights do not violate [28 U.S.C. § 2072] if reasonably necessary to maintain the integrity of that system of rules.

Id. at 5, 107 S.Ct. at 970.

Rule 11, like Rule 38, may provide for the award of just damages to a party burdened by frivolous conduct, and is similarly essential to the underlying purpose of the Federal Rules of Civil Procedure, which are to be "construed to secure the just, speedy and inexpensive determination of every action." Rule 1, Fed.R.Civ.P.

Furthermore, the Fifth Circuit, in upholding the validity of Rule 11 under the Rules Enabling Act, concluding that Rule 11 serves to regulate procedure by discouraging groundless judicial proceedings, and does not confer any new substantive rights. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 (5th Cir. 1988); *See also Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3rd Cir.1987) (Rule 11 does not occasion a substantive change in the general rule against fee shifting, but instead provides for a correction of litigation abuses which does not offend the Rules Enabling Act); *Schmitz v. Campbell-Mithun, Inc.*, 124 F.R.D. 189, 193 (N.D.Ill.1989) (Rule 11 is procedural, designed to protect the integrity of papers submitted to the Court, and does not run afoul of the Rules Enabling Act).

Accordingly, there is no basis for Washburn's assertion that Rule 11 violates the Rules Enabling Act by abrogating an illusory common law immunity to engage in vexatious conduct.

extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost in the litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

While the imposition of sanctions is mandatory when a claim has absolutely no chance of success, the Court is to avoid hindsight review of the claim, to resolve all doubts in favor of the signer and to refrain from imposing sanctions where such action would stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. *Motown Productions, Inc. v. Cacomm, Inc.*, 849 F.2d 781,785 (2d Cir. 1988); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

There need be no showing of bad faith on the part of the signer of the submission at issue for the imposition of sanctions. *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir.1989). **[412]** Instead, sanctions are appropriate where an attorney's signed submission fails to meet a test of objective reasonableness. *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 22 (2d Cir.1990); *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, *supra*, 886 F.2d at 504.

> Although other goals for the imposition of sanctions under Rule 11 may exist, for example, punishment for violation of the Rule, compensation for victim of the violation, and deterrence of others, focus should be on the drafters' aim of discouraging dilatory and abusive litigation tactics and eliminating frivolous claims and defenses, thereby speeding up and reducing the costs of the litigation process. Sanctions are the deterrent threat, [citation omitted] by which a district court judge may deal with counsel who ignore their broadened responsibility under the amended Rule to forward the effective administration of justice.

McMahon v. Shearson/American Express, Inc., *supra*, 896 F.2d at 21.

2. Washburn's Conduct and Rule 11 Sanctions

Washburn was twice warned by the Court that resubmitting the motion without factual affidavits or other additional support would expose him to the risk of Rule 11 sanctions. The arguments advanced by Washburn were each previously rejected by the Court and, with the exception of the challenge to the manner of service on Talluto and LaPenna, were each manifestly frivolous. When an attorney submits, or resubmits, a motion that he knew, or should have known, was meritless, Rule 11 sanctions are appropriate. *See Vekris v. Peoples Express Airlines, Inc.*, 707 F.Supp. 679, 682 (S.D.N.Y.1988) (submission of motion for reargument which merely rehashed arguments previously made and decided was precisely the sort of frivolous motion targeted by Rule 11); *Fuji Photo Film U.S.A. v. Aero Mayflower Transit Co., Inc.*, 112 F.R.D. 664, 667-68 (S.D.N.Y.1986); *Northern Trust Co. v. Muller*, 616 F.Supp. 788, 790 (N.D.Ill.1985). While the Court does not impose sanctions lightly, an objective analysis of Washburn's conduct in resubmitting the motion without affidavits or additional support, and in substantially the same manner as it had been when previously denied by the Court, leads only to the conclusion that Washburn violated Rule 11. Such vexatious conduct, which unduly delayed the adjudication of the contempt proceedings, cannot be countenanced by the Court, nor should plaintiffs be forced to bear the excess burden Washburn's actions placed upon them.

Accordingly, the Court imposes Rule 11 sanctions against Washburn, in the amount of the costs and attorneys' fees reasonably incurred by plaintiffs in filing their motion for sanctions and their response to the renewed motion to dismiss.

E. *The Motion to Strike a Portion of the Record and Impose Sanctions on Hale under 28 U.S.C. § 1987*

Plaintiffs moved to strike a portion of the record and for costs and attorneys' fees pursuant to 28 U.S.C. § 1927 against Hale, attorney for the Nathansons. At the close of the evidentiary hearing held regarding the conduct of Pearson and the Nathansons, Hale asserted that Ex. 9, a police videotape of the Dobbs Ferry demonstration on October 29, 1988, had been tampered with to include a "snippet" showing A. Nathanson sitting on the steps of the clinic seconds after Lt. Perilli read the October 27 Order to the demonstrators.

The foundation for Hale's serious assertion of impropriety concerning this piece of evidence was his observation, upon viewing the videotape in Court, that the particular segment in dispute showed the date but not the time, while the footage immediately preceding it showed the time. Hale had the opportunity to view the tape on August 9, 1988, prior to the hearing. He maintains, however, that he did not remember seeing the disputed segment at that time. Affidavit of John P. Hale, filed September 29, 1989. The Court allowed Hale to secure an expert to inspect the videotape, but Hale never availed himself of this opportunity. Instead, Hale interviewed Lt. Perilli and the operator of the police video machine, [413] and discovered that there was no basis to his claim. Hale notified the Court that he was withdrawing his objections to the videotape by letter, dated September 5, 1989. Prior to advising the Court that he withdrew his objections, however, Hale spoke with counsel for plaintiffs three times, each time broaching the topic of settlement, as well as the issue of the videotape. Affidavit of Mary M. Gundrum, filed September 8, 1989 ¶¶ 5-7.

Plaintiffs ask that the portion of the record which contains Hale's admittedly erroneous assertion that the videotape was altered be stricken, in order to clarify the record and to remove the groundless suggestion of improper behavior on the part of plaintiffs and their counsel. Hale offers no objection to this portion of the motion. The Court believes these fallacious accusations have no place in the record, and agrees with plaintiffs' suggestion that they be stricken. Accordingly, pages 573 to 583 and pages 601, line 14 to 602, line 8, are hereby stricken from the record.

Plaintiffs next argue that sanctions should be imposed against Hale under 28 U.S.C. § 1927. Section 1927 provides that:

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and

> attorneys' fees reasonably incurred because of such conduct.

This provision is to be construed narrowly and with caution by the courts. *Mone v. Commissioner of Internal Revenue*, 774 F.2d 570, 574 (2d Cir. 1985). To justify the imposition of sanctions under section 1927, the attorney's "conduct must be of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation." *Colucci v. New York Times, Co.*, 533 F.Supp. 1011, 1014 (S.D.N.Y. 1982). *See also McMahon v. Shearson/American Express, Inc.*, *supra*, 896 F.2d at 23.

Hale's conduct in (1) making such a serious accusation prior to undertaking an inquiry into its basis when the opportunity to inspect the tape had been previously made available to him, and (2) referring to this allegation in settlement conversations with plaintiffs, is more than a little troubling to the Court. See D.R. 7-105(A), Code of Professional Responsibility, Appendix to New York State Judiciary Law (a lawyer shall not threaten criminal charges solely in an attempt to obtain an advantage in a civil matter). In the Court's view, however,this conduct did not rise to the level of bad faith necessary to warrant the imposition of sanctions, as a discrepancy appeared to exist which could not be readily explained at the hearing, and Hale withdrew his charge upon discovering that it had no merit. *Cf. Woodfork v. Gavin*, 105 F.R.D. 100, 105 (N.D.Miss. 1985) (sanctions imposed under section 1927 because attorney maintained allegations of fraud and criminal conduct after subsequent discovery proved these allegations to be unfounded). Therefore, no sanctions will be imposed against Hale.

CONCLUSION

Plaintiffs' motion for civil contempt is granted in part and denied in part. Defendants Randall Terry and Operation Rescue are adjudged in civil contempt of this Court's October 27 Order and Permanent Injunction and are assessed coercive civil penalties in the amount of $100,000. Defendant Herlihy is adjudged in civil contempt of this Court's May 4 Order and assessed coercive civil penalties in the amount of $25,000. Respondent B.O.R.N. is adjudged in civil contempt of this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman is adjudged in civil contempt of the Court's May 4, Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents McMonagle and White are adjudged in civil contempt [414] of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Bernard Nathanson is not adjudged in civil contempt.

Each of the contemnors is liable to plaintiffs for a pro rata share of the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her, with the exception of the renewed cross-motion to dismiss filed by attorney Washburn.

The renewed cross-motion to dismiss on behalf of respondents Talluto, LaPenna, White and McMonagle, is denied. Plaintiffs' motion for the imposition of Rule 11 sanctions against attorney Washburn is granted. Washburn is liable to plaintiffs for the attorneys' fees and costs they incurred as a result of filing their motion for sanctions and responding to his renewed cross-motion to dismiss.

Plaintiffs are directed to serve and file, within twenty (20) days of the date of this decision, an application detailing their expenses, including their attorneys' fees, regarding the contempt proceedings and the renewed cross-motion.

The motion by plaintiffs to strike a portion of the record and impose sanctions under 28 U.S.C. § 1927 against attorney Hale is granted in part and denied in part. The record is stricken in accordance with plaintiffs' request, but the Court declines to impose sanctions on Hale.

In addition, plaintiffs are directed to confer with counsel representing respondent Slattery, and apprise the Court by letter no later than March 6, 1990, of several mutually convenient dates for a conference on the pending application to hold him in civil contempt. Defendants' requests to submit sur-reply briefs to the pending motions by plaintiffs for attorneys' fees and costs under 42 U.S.C. § 1988 and by the United States to confirm an order of attachment are granted. Defendants shall serve and file the sur-reply briefs by March 2, 1990, and each moving party may serve and file any final response by March 9, 1990.

Settle orders on notice.

APPENDIX J

Permanent Injunction dated January 10, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION
FOR WOMEN, et al.,

Plaintiffs,

THE CITY OF NEW YORK,

Intervenor-Plaintiff,

-against-

RANDALL TERRY, et al.,

Defendants.

ORDER

UPON the undisputed facts in this case, supported by the affidavits, exhibits, and three statements of stipulated facts, the summons and complaint, and all papers and proceedings herein, and counsel for all parties have appeared and argued before the Court on January 6, 1989, it is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other local organizations and persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue participants") are:

1) permanently enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester counties;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Countries; Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue Participants' exercise of their legitimate First Amendment rights, and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this Order shall subject him or her to civil damages of $25,000 per day for the first violation of this Order; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Order; and

Upon application of the City of New York, it is further

ORDERED that in addition to the per diem amount ordered above, Operation Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue participants give the

New York City Police Department twelve hours advance notice of the location of each day's demonstrations.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
January 10, 1989

APPENDIX K

Preliminary Injunction Order
Dated October 27, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, THE CITY OF NEW YORK, et al.,

Plaintiffs,

-against-

RANDALL TERRY, OPERATION RESCUE, THOMAS HERLIHY et al.,

Defendants.

ORDER

UPON the testimony of witnesses for plaintiffs and defendants heard before this Court on October 25 and 27, 1988, the affidavits submitted herein by plaintiffs, plaintiff-intervenor, and defendants, the exhibits attached thereto, the three statements of stipulated facts, the summons and complaint, and all the papers and proceedings herein, and counsel for all parties having appeared and argued before the Court on October 25 and 27, 1988, it is hereby

ORDERED that the order issued by Justice Herman Cahn on April 28, 1988, modified by Justice Cahn on May 2, 1988, and modified by order of this Court on May 4, 1988, is hereby again modified by order of this Court, and as restated herein in full as follows:

It is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue participants") are

1) enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties, on October 28, 29 and 31, 1988;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York; Nassau, Suffolk, or Westchester Counties, on October 28, 29, and 31, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and if anyone who wants to, who is sought to be counseled wants to not having counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this Order shall subject them to civil damages of $25,000 per day for any violations of this Order; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and

Upon application of the City of New York, it is further

ORDERED that in addition to the $25,000 per diem amount ordered above, Operation Rescue or National Day of Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue or National Day of Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue or National Day of Rescue Participants give the New York City Police Department twelve hours advance notice of the location of each day's demonstrations.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
October 27, 1988
3:45 P.M.

APPENDIX L

Temporary Restraining Order Dated May 5, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION
FOR WOMEN, et al.,

Plaintiffs,

CITY OF NEW YORK,

Plaintiff-Intervenor,

-against-

RANDALL TERRY, et al.,

Defendants.

TEMPORARY RESTRAINING ORDER

Upon the affidavits submitted herein by plaintiffs, plaintiff-intervenor, and defendants, the exhibits attached thereto, the statement of stipulated facts, the summons and complaint, and all the papers and proceedings herein, and counsel for all parties having appeared and argued before the Court on May 4, 1988, it is hereby

ORDERED that the temporary restraining order issued by Justice Herman Cahn on April 28, 1988, and modified by Justice Cahn on May 2, 1988, is hereby continued as modified as of 8:40 P.M. on May 4, 1988 by order of this Court on the record in open court, and as restated herein in full as follows:

It is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order are:

1) enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit defendants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that defendants' failure to comply with this Order, shall subject them to civil damages of $25,000 per day for any violations of this Order; and it is further

ORDERED that security in the amount of $5,000.00 be posted by plaintiffs prior to May 6, 1988 at 5:00 P.M.; and further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further order of the Court; and

Upon application of the City of New York, it is further

ORDERED that in addition to the $25,000 per diem amount ordered above, defendants shall be liable to pay any excess costs incurred by the City of New York as a result of defendants' failure to provide the City with advance notice of the location of their demonstration, unless defendants give the New York City Police Department twelve hours advance notice at the phone number provided to defendants' counsel in open court or the location of each day's demonstration.

Copies of this signed order shall be served upon the Financial Deputy in room 14 and the Clerk in room 18.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
May 5, 1988
9:45 A.M.